



6325-39-P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 410, 550, 551, and 870

RIN: 3206-AN19

Overtime Pay for Border Patrol Agents

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing final regulations to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014, as amended, which established a new method of compensating Border Patrol agents for overtime work. Payments under this new provision will become payable beginning with the first pay period beginning in January 2016. These regulations affect only Border Patrol agents in the U.S. Customs and Border Protection component of the Department of Homeland Security.

DATES: *Effective date:* This rule is effective [INSERT DATE 20 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability dates: This rule is applicable beginning on January 10, 2016, except that §§ 550.1602-550.1605 and 550.1611-550.1615 are applicable on the effective date of this rule, as provided by section 2(i) of Public Law 113-277, as amended.

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SUPPLEMENTARY INFORMATION: On June 17, 2015, the Office of Personnel Management (OPM) published proposed regulations (80 FR 34540) to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277, December 18, 2014, as amended by Public Law 114-13, May 19, 2015), hereafter referred to as “BPAPRA.” BPAPRA established a new method of compensating Border Patrol agents for overtime work. Most BPAPRA provisions are effective on the first day of the first pay period beginning on or after January 1, 2016.

The 30-day comment period for the proposed regulations ended on July 17, 2015. We received comments from 1 agency, 1 union, and 66 individuals. This **Federal Register** notice provides general information, addresses the comments received, and issues final regulations that reflect changes to the proposed regulations. OPM is adding a new subpart P, Overtime Pay for Border Patrol Agents, in part 550 (Pay Administration – General) of title 5, Code of Federal Regulations, and revising other related regulations.

Summary of BPAPRA

Under BPAPRA, a new form of overtime compensation will apply to Border Patrol agents employed by the U.S. Customs and Border Protection (CBP) component of the Department of Homeland Security (DHS). The key features of BPAPRA are summarized below:

- Most Border Patrol agents will have the opportunity each year to elect to be assigned to one of three types of “regular tour of duty” which provide different rates of compensation: (1) a Level 1 regular tour of duty, which provides an overtime supplement equal to 25 percent of basic pay for a regular schedule of 10 hours each regular workday, including 2 overtime hours; (2) a Level 2 regular tour of duty, which provides an overtime supplement equal to 12.5 percent of basic pay for a

regular schedule with 9 hours each regular workday, including 1 overtime hour; and (3) a Basic regular tour of duty with a regular 8-hour workday, which provides no overtime supplement.

- CBP may assign regular tours of duty in certain circumstances without regard to agent elections. For example, agents assigned to care for canines must be assigned a Level 1 regular tour of duty. Agents in certain positions—headquarters, administrative, or training or fitness instructor—must be assigned a Basic regular tour of duty unless a different tour is justified based on a staffing analysis. In addition, generally no more than 10 percent of agents at a location may have a Level 2 or Basic regular tour of duty. In other words, generally at least 90 percent of agents at a location must have a Level 1 regular tour of duty. CBP may revise the percentage requirement for a location if justified based on a staffing analysis.
- The requirement for 1 or 2 hours of scheduled overtime within a Level 2 or Level 1 regular tour of duty, respectively, applies only if the agent performs work during regular time on that same day. For example, if an agent takes leave for a full 8-hour basic workday, no obligation to perform those scheduled overtime hours accrues on that day, and there is no loss of pay.
- The overtime supplement for regularly scheduled overtime hours within the assigned Level 1 or Level 2 regular tour of duty is a percentage of the agent's hourly rate of basic pay and is multiplied by the number of paid hours of basic pay (i.e., hours of regular time, whether work or paid absence) in the biweekly pay period. Thus, the supplement is payable during paid leave or other paid time off taken from the 40-hour basic workweek.

- The overtime supplement is subject to the title 5 premium pay cap.
- An agent may not receive other premium pay for regularly scheduled overtime hours *within* his or her regular tour of duty (i.e., hours covered by the overtime supplement).
- The overtime supplement is treated as part of basic pay for retirement and certain other purposes, such as life insurance and severance pay.
- In consultation with OPM, CBP must develop a plan to ensure that the assignment of an overtime supplement to an agent during the period beginning 3 years before the agent reaches retirement age and service requirements is consistent with the agent's career average overtime supplement.
- Overtime work in excess of the biweekly regular tour of duty (generally 100, 90, or 80 hours, as applicable) is separately compensable. If the additional overtime work is regularly scheduled in advance of the workweek, the work is compensated under the regular title 5 overtime provisions (5 U.S.C. 5542). If the additional overtime work is irregular, the work is compensated by crediting the agent with compensatory time off. However, no more than 10 hours of compensatory time off may be earned in a biweekly pay period (unless a written waiver of this provision is approved in advance) and no more than 240 hours may be earned during a leave year.
- If the agent is absent during required scheduled overtime within the regular tour of duty (i.e., obligated overtime hours), payment of the overtime supplement is not affected but the agent accrues an obligation (debt) to perform other overtime work to make up for work not performed. Any accrued compensatory time off will be applied against that overtime hours debt. Any additional overtime work outside the regular tour of duty in future pay periods will also be applied against that debt.

- All Border Patrol agents are FLSA-exempt. This exemption applies to both the minimum wage and the maximum hours and overtime provisions of the FLSA.

Statutory Effective Date

BPAPRA was enacted on December 18, 2014 as Public Law 113-277. On May 19, 2015, BPAPRA was amended by Public Law 114-13 to clarify the effective date of certain provisions. Section 1(a) of Public Law 114-13 added a new subsection (i) in section 2 of BPAPRA. That section 2(i) provided that subsections (b), (c), (d), and (g) of section 2 of BPAPRA are effective on the first day of the first pay period beginning on or after January 1, 2016, except that (1) any provision of 5 U.S.C. 5550(b) (as added by section 2(b) of BPAPRA) relating to administering elections and making advance assignments to a regular tour of duty is applicable before the January 2016 effective date to the extent determined necessary by the OPM Director and (2) the OPM Director's authority to issue regulations (in particular, the authority in 5 U.S.C. 5550(b)(1)(B) related to election procedures) is effective as necessary before the January 2016 effective date.

As required by these regulations, CBP must provide election information notices to Border Patrol agents no later than November 1 and agents must make elections for the upcoming annual period no later than December 1. Thus, BPAPRA provisions related to administering annual elections and advance assignments for the annual period beginning in January 2016 (§§ 550.1602-550.1605 and 550.1611-550.1615) must be effective as necessary before January 2016.

As provided by Public Law 114-13, regular tours of duty and any associated overtime supplements established under 5 U.S.C. 5550 (as added by section 2(b) of BPAPRA) will first take effect on the first day the first pay period beginning on or after January 1, 2016. That pay

period begins on January 10, 2016. Other BPAPRA provisions that are effective on January 10, 2016 include (1) the amendments to 5 U.S.C. 5542 (dealing with overtime pay and compensatory time off) made by section 2(c) of BPAPRA, (2) the amendments to 5 U.S.C. 8331 (dealing with retirement-creditable basic pay) made by section 2(d) of BPAPRA, (3) the amendments to 5 U.S.C. 5547 (dealing with the premium pay cap) made by section 2(g)(1) of BPAPRA, and (4) the amendments to section 13(a) of the FLSA (dealing with FLSA exemptions) made by section 2(g)(2) of BPAPRA.

The “Applicability Dates” shown at the beginning of the Preamble reflect the statutory effective dates.

Comments on Proposed Regulations

Below we will summarize and respond to comments on the proposed regulations, organized by the affected regulatory section number. We received 68 comments, including comments from CBP, the agency employing Border Patrol agents, and from the National Border Patrol Council (NBPC), a labor union that represents Border Patrol agents. Comments from CBP and NBPC are identified, while comments from individuals are not. Also, we address below certain clarifying changes we are making that are not a response to a specific comment but provide a general response to comments requesting greater clarity.

General Comments on BPAPRA

A number of commenters expressed general concerns and objections about the content of the BPAPRA statute. Some objected to the loss of entitlement to overtime pay under FLSA rules and the resulting loss in pay. Some objected to being paid the equivalent of a straight rate for within-tour overtime work through the Border Patrol overtime supplement. Some objected to the title 5 capped overtime hourly rate that would be applied to regularly scheduled overtime hours

outside the agent's regular tour. Some objected to the use of compensatory time off to compensate agents for irregular overtime hours and to the statutory rules governing such compensatory time off. Some believed it was unfair that other categories of employees have more generous overtime pay entitlements—for example, Customs and Border Protection officers who receive a double overtime rate. Some stated they would prefer receiving law enforcement availability pay. Some objected to the fact that the Basic tour was the default tour for employees in headquarters and certain other positions, which penalizes them for providing critically important services to CBP. One commenter objected to changes in the pay rules being made in mid-career. Another objected to having three possible types of tours, stating that all agents should work the same hours. A couple of commenters objected to the general requirement that 90 percent of agents have a Level 1 tour (100 hours per pay period). One commenter objected to the requirement to make up for absences from within-tour obligated overtime hours. Some commenters acknowledged that their union supported the bill, but asserted that many agents opposed it. Several commenters stated their belief that the new overtime pay system would result in morale and staffing problems.

The above-described comments relate to provisions in the law itself. OPM regulations must implement those provisions and cannot make changes to address these comments.

§ 550.1603 - Definitions

NBPC commented that the definitions of *irregular overtime work* and *regularly scheduled work* (which includes regularly scheduled overtime work) require that the work be officially ordered or approved, a title 5 concept that is different than the “suffered-or-permitted” standard used under FLSA. NBPC stated that agents frequently must extend their work hours to pursue illegal aliens or drug smugglers without supervisory approval due to lack of radio

communications. NBPC recommended that the regulations be revised to provide that agents be compensated for hours when they voluntarily extend their workday, especially if they are unable to contact a supervisor.

By law, agents are no longer subject to FLSA rules, including the suffered-or-permitted standard, but are instead under title 5 rules; therefore, we are applying the longstanding “ordered-or-approved” standard that applies to normal overtime (5 U.S.C. 5542(a)). Under the title 5 standard, overtime work is either ordered in advance or approved after the fact based on agency policies. CBP should clearly communicate to agents its policies regarding when an agent’s activities will be retroactively approved as compensable hours of work. We note that agents were formerly covered by the administratively uncontrollable overtime (AUO) provision in 5 U.S.C. 5545(c)(2), which expressly recognizes that an employee is generally responsible for recognizing, without supervision, circumstances that require the employee to remain on duty. While the AUO provisions no longer apply, CBP may provide agents with similar discretion (subject to after-the-fact agency approval) under agency policies as necessary to support its mission. Some matters relating to overtime work, such as procedures and appropriate arrangements for adversely affected employees, may be subject to collective bargaining.

We are making a clarifying change to the definition of *overtime supplement* to state that, for an agent with a Basic regular tour of duty, the overtime supplement is 0 percent. This change has been made to clarify that the 0 percent overtime supplement should be used in career average calculations under § 550.1615. Under 5 U.S.C. 5550(b)(1)(G)(i), the career average is based on the “average border patrol rate of pay level,” where the Border Patrol rate of pay may be a Level 1 rate (Basic rate plus 25 percent overtime supplement), Level 2 (Basic rate plus 12.5 percent overtime supplement), or Basic rate (0 percent overtime supplement). In drafting our

regulations, we found it clearer to focus on the overtime supplement as a separate payment rather than refer to an aggregate rate. Thus, in the regulations on the career average computation, we are computing a career average overtime supplement, but that average must include any periods where a 0 percent supplement was in effect.

§ 550.1604 – CBP Authority

CBP commented that the regulations should specifically reassert that nothing in the statute or regulations may be construed to affect the requirement that a Border Patrol agent must work overtime as assigned as a condition of employment. CBP was concerned that some may think that only overtime work within the regular tour of duty was required. CBP cited 5 U.S.C. 5550(g) and BPAPRA section 2(f) to show that agents are required to perform outside-tour overtime work in accordance with CBP needs.

We agree that CBP has clear authority to require agents to work outside-tour overtime based on CBP needs. In fact, the proposed regulations addressed this matter in § 550.1604, which explicitly cited 5 U.S.C. 5550(g) and BPAPRA section 2(f). This provision is unchanged in the final regulations. In general, OPM regulations do not address when a work requirement is a “condition of employment,” since that is a matter of agency policy under its broad management authority in 5 U.S.C. 301-302.

§§ 550.1611 and 550.1612 – Tour Assignments

An individual commented that employees working at training centers have functions to perform that require overtime beyond the regular 8-hour basic workday.

We understand this comment to be directed at the fact that a Basic tour (40 hours a week) is the default tour assignment for an agent holding a training instructor position at a CBP training facility. This is a matter of law, but both the law and the regulations recognize the possibility of

assigning training instructors a Level 1 or Level 2 tour based on a comprehensive staffing analysis under BPAPRA section 2(e). (See 5 U.S.C. 5550(b)(1)(D)(iv) and 5 CFR 550.1611(f)(3).) We note that CBP may assign scheduled and irregular overtime to training instructors as necessary to perform needed work beyond the assigned tour. (See BPAPRA sections 2(a) and 2(f)(1).)

One individual explained how it was unfair and harmful to CBP to deny headquarters and academy training staff the option of receiving an overtime supplement (Level 1 or 2). The individual observed that, faced with drastic pay reductions, agents would not seek promotions to headquarter/academy positions or would seek demotions to leave those positions. Another individual commented that some headquarters agents have duties that are more operational than administrative and that it is unfair to deny such agents a Level 1 or Level 2 tour.

The BPAPRA statute expressly provides that a Basic tour (40-hour week) is the default tour for agents in certain positions, including agents in a position at CBP headquarters, a position as a training instructor at a CBP training facility, an administrative position, or a position as a fitness instructor (5 U.S.C. 5550(b)(1)(D)(iv)). A headquarters position, regardless of whether it is considered primarily operational or administrative is covered by this provision. Congress determined that all headquarters positions should be treated the same in terms of the default tour. However, a Level 1 or Level 2 tour may be assigned to agents holding a headquarters position based on a comprehensive staffing analysis showing such tours are necessary to more adequately fulfill CBP operational requirements.

Two individuals commented that the term “administrative position” is vague and should be defined in regulation.

We considered whether we should attempt to define the term “administrative position” when we drafted the proposed regulations. We concluded then, and continue to believe now, that CBP is in the best position to determine whether a particular position is primarily administrative in nature. We have revised § 550.1611(f)(3) to clarify that CBP is responsible for making that determination.

CBP provided comments requesting clarification regarding how long an agent with an assigned Level 1 or Level 2 tour could be detailed to a position that is authorized only for a Basic tour, such as a headquarters position and a training academy position. CBP noted that the proposed regulations did not address this issue and recommended that, at a minimum, the time limit be 60 workdays.

We agree that the proposed regulations did not address the treatment of a temporary detail of an agent to a position that requires a Basic regular tour of duty under 5 U.S.C. 5550(b)(1)(D)(iv) and § 550.1611(f)(3). We do not believe that a short temporary detail should affect an agent’s otherwise applicable assigned tour. Rather than establish a rule based on the number of workdays, we are establishing a rule based on the number of calendar days to simplify administration. We believe that it would be reasonable to establish 90 days as the calendar day limit. Ninety calendar days is roughly equivalent to the 60 workdays that CBP originally requested as a minimum. Accordingly, we are adding a new paragraph (g) in § 550.1611 to address temporary details that involve (i.e., detail to or from) a position of the type described in § 550.1611(f)(3). For consistency, this treatment must work in both directions. If an agent officially in a position not requiring a Basic tour (i.e., noncovered position) is serving under a temporary detail to a position whose incumbent is normally required to have a Basic tour (i.e., covered position), the agent will be considered to be serving in a noncovered position during the

first 90 days of the detail. Likewise, if an agent in a covered position requiring a Basic tour is serving under a temporary detail to a noncovered position, the agent will be considered to be in a covered position during the first 90 days of the detail. After completing 90 days under a temporary detail, an agent will be considered, for the purpose of applying paragraph (f)(3), to hold the position to which temporarily detailed for the remainder of the detail, notwithstanding the agent's official position of record.

NBPC commented that § 550.1611(f)(2) is not clear. Consistent with law, that provision states that an agent who is "unable to perform overtime on a daily basis, as determined by CBP," must be assigned a Basic tour. NBPC states that the regulation should be clarified to state that this provision is triggered only when an agent's law enforcement authority is revoked and asserts that this was always the intent.

The plain language of the law does not limit an "inability" finding to situations where an agent's law enforcement authority is revoked (e.g., due to an investigation, loss of security clearance, or suspension or other disciplinary action). The law simply states "if at any time U.S. Customs and Border Protection concludes that a border patrol agent is unable to perform overtime on a daily basis" it must assign the agent a Basic tour. If Congress intended to limit the application to situations where law enforcement authority is revoked, it could have easily so stated that. The Senate committee report on BPAPRA states that CBP has authority to assign a Basic tour "if CBP thinks the agent is unable, *for any reason*, to work the additional hours" (emphasis added). S. Rep. No. 113-248, p. 13 (August 26, 2014). Given the clear language of the law and intent of Congress, CBP is permitted to make these determinations for any reason, subject to any limitations prescribed by OPM in regulation. The proposed regulations included no such limitations.

CBP also commented on § 550.1611(f)(2), requesting that OPM provide guidance on what constitutes being “unable to perform” the obligated overtime hours. CBP stated its belief that, at a minimum, the term included situations in which an agent’s law enforcement authority is revoked. CBP also asked for clarification regarding situations where an agent is on light duty for physical or medical reasons (e.g., working an 8-hour basic workday, but not overtime hours). CBP pointed out that such an agent may have unused compensatory time off that could be applied against the accruing overtime hours debt. CBP also asked for clarification regarding whether the “inability” provision could be applied to an agent who is on paid leave for a full day and therefore is not accruing an overtime hours debt.

Given the requests for clarification from both CBP and NBPC, we are making revisions in these final regulations. We are adding a new paragraph (e) in § 550.1612 and amending paragraph (f)(2) in § 550.1611 to reference that new paragraph. Paragraph (e) addresses the bases on which CBP may make a determination regarding an employee’s inability to perform overtime work and the effective date of such an inability determination. In paragraph (e)(1), we provide that an inability determination may be made (i) when an agent’s law enforcement authority is revoked, (ii) when an agent’s inability will last for an extended period due to physical or health reasons, or (iii) for any other appropriate reason, as determined by CBP, but excluding inability based on lack of work, rather than the employee’s availability to work. The second condition parallels a similar provision that applies to recipients of law enforcement availability pay under 5 CFR 550.184(d). CBP will determine what constitutes an “extended period” under its policies. CBP would not be required to make an inability determination for a short-term medical condition. The third condition provides CBP with discretion, as intended by Congress, but clarifies that an inability determination cannot be based on lack of work

(workload), but must be based solely on the employee's ability and availability to work.

Workload management is the responsibility of CBP, which should adjust staffing levels and assignments as necessary to ensure that agents have sufficient work to fill agents' assigned regular tours of duty at any location. The third condition provides a broad, catch-all authority to cover any other appropriate situations where CBP determines that it is reasonable to find that an agent is unable to regularly perform overtime work. Some matters relating to overtime assignments, such as procedures and appropriate arrangements for adversely affected employees, may be subject to collective bargaining.

In paragraph (e)(2) of § 550.1612, we state a general rule that the change to a Basic tour takes effect on the agent's next workday; however, we provide for the possibility of exceptions. CBP may delay the effective date until the beginning of the next week or biweekly pay period (which simplifies administration). CBP may delay the effective date to allow an employee who is working during regular time to use up unused compensatory time off hours by applying those hours against the debt resulting from the agent's absences during obligated overtime hours. CBP may delay the effective date to allow an employee to use accrued paid leave or other paid time off if the agent will be performing no work during regular time for a continuous block of time. CBP may also delay the effective date during a continuous leave without pay period granted under the Family and Medical Leave Act. The above-described delays are approved at CBP's discretion; however, we provide that CBP must delay the effective date when the employee's inability to perform overtime work is based on a job-related injury covered by workers' compensation provisions.

CBP commented that the regulations should allow an agent to request, during an annual period, a change to a regular tour of duty with a lesser number of hours, notwithstanding the

agent's election for that annual period. CBP noted that OPM regulations for the law enforcement availability pay (LEAP) program allows criminal investigators to request that LEAP be temporarily discontinued due to a personal or family hardship. (See 5 CFR 550.182(f), "Voluntary opt-out.")

The BPAPRA law is very specific regarding the circumstances under which types of regular tours of duty are assigned. In particular, the BPAPRA specifically provides that tours are elected/assigned for a full annual period, with a limited set of superseding rules. Thus, the statutory framework differs from that found in the LEAP law. Fortunately, the concern CBP raises can largely be addressed within the BPAPRA statutory framework. Under 5 U.S.C. 5550(b)(1)(D)(iii), CBP may determine that an agent is "unable to perform overtime on a daily basis" and then assign a Basic tour. The law does not prescribe the specific reasons the agent is "unable" to perform overtime. As discussed above, we are adding a new paragraph (e) in § 550.1612, which provides additional parameters for this CBP authority. Paragraph (e)(1)(iii) allows CBP to base an inability determination on other appropriate reasons, as determined by CBP. This broad language would allow CBP to approve a requested mid-year change in an agent's tour based on personal or family hardship situation, if CBP determines that the hardship makes the agent unable to work the otherwise applicable tour.

CBP raised the idea that perhaps an agent's tour election or assignment could be changed pursuant to a directed assignment to another agent position in situations not covered by § 550.1612(d). CBP pointed out that OPM regulations allow elections to be made regarding the tour a new agent will have after completing basic training—even though the law is silent about such elections.

We don't believe a change in an agent's position provides any basis for changing the agent's tour election or assignment unless one of the superseding rules cited in § 550.1612(d) are applicable. Those superseding rules are found in § 550.1611(f) and § 550.1622 and are based on statutory provisions. (We have revised § 550.1612(d) to reference all of § 550.1622, rather than just paragraph (b), to avoid confusion. Paragraph (c) of § 550.1622 (dealing with canine handlers) is already implicated by paragraph (f)(1) of § 550.1611.) The BPAPRA law clearly anticipates that tour elections will be applicable for a full annual period absent a superseding tour assignment. If an agent changes positions, CBP is responsible for ensuring that the agent is assigned sufficient work in the new position to fill the agent's assigned tour.

In contrast, since the BPAPRA law did not address the assignment of tours to newly hired agents, there was a clear policy gap that OPM needed to fill by regulation. The law was focused on agents who were already on board as of November 1 and able to make elections for the next annual period. It did not address agents hired during the annual period. Also, the law addressed periods of "advanced training" but not periods of "initial training." Regulations were necessary to cover these unaddressed circumstances.

Based on comments received regarding § 550.1622(c) (dealing with canine handlers), we are making changes in § 550.1611(e) and § 550.1612(d). Those changes address the canine handler issues but also apply generally to other circumstances. (See section of this Supplementary Information dealing with comments on § 550.1622.)

§ 550.1614 – 10 percent Limit on Agents at Location without a Level 1 Tour

Several commenters objected to the default 10 percent limit on the number of agents in any location who could have less than a Level 1 tour (i.e., Basic or Level 2). They had understood that the limit was going to be 20 percent (allowing 10 percent in the Basic tour

category and 10 percent in the Level 2 category). They objected to being forced to have a Level 1 tour (10-hour workday) with a 25 percent overtime supplement, which they equated to receiving the equivalent of the regular straight rate for within-tour overtime hours. One individual was concerned that seniority would be used to determine which employees could have a Level 2 or Basic tour and that he/she would not be able to have a Basic tour that would allow him/her to spend time with a new child. Some commenters questioned whether there was sufficient work to justify requiring 90 percent of agents to have a Level 1 tour.

The BPAPRA law clearly provides that, as a default rule, not more than 10 percent of agents (i.e., combined count) at any location may be assigned to a Level 2 tour or a Basic tour (5 U.S.C. 5550(b)(1)(E)). Congressional intent is also clear. The Senate committee report on the bill that was later enacted as BPAPRA provides: “The bill initially requires that no more than 10 percent of the agents at any given location be allowed to work less than 100 hours per two-week pay period CBP must unilaterally assign agents to work the extra hours in order to ensure that 90 percent of Border Patrol agents in that location are working 100 hours per pay period.” S. Rep. No. 113-248, p. 9. The report also refers to “the bill’s baseline requirement that 90 percent of agents at a location work 100 hours per pay period at the level 1 Border Patrol rate of pay.” Id. at 11. Under 5 U.S.C. 5550(b)(1)(E), the baseline requirement may be waived at a particular location based on a comprehensive staffing analysis conducted under BPAPRA section 2(e). OPM’s regulations in § 550.1614(b) address this waiver authority and allow CBP to establish a higher percentage limit than 10 percent based on the staffing analysis. OPM regulations do not establish specific criteria for selecting which agents can have a tour of less than Level 1; however, in § 550.1613, we require that CBP establish a written selection plan that identifies selection criteria and the priority of those criteria.

NBPC questioned the regulation at § 550.1614(d), which provides that assignments of tours to individual agents must be consistent with the pay assignment continuity requirement in § 550.1615, regardless of the percentage limits set under § 550.1614. NBPC commented that it was completely contrary to the express intent of Congress that the pay assignment continuity requirement trump the § 550.1614 percentage limits (i.e., 10 percent baseline or alternative percentage limit under the waiver authority). NBPC stated that it was beyond the authority of OPM—even given its authority to regulate BPAPRA—to craft an exception to an express direction of Congress.

Section 550.1614(d) relies on express language in the law stating that, “notwithstanding any other provision of law,” CBP “may take such action as is necessary” to implement the pay assignment continuity plan, including the unilateral assignment of agents to any of three tours (5 U.S.C. 5550(b)(1)(G)(ii)). In addition, Congress granted OPM broad authority to regulate BPAPRA (section 2(h); see also 5 U.S.C. 5548). The “notwithstanding any other provision of law” language gives ample authority to trump the percentage limits established under 5 U.S.C. 5550(b)(1)(E). Any CBP selection plan under § 550.1613 must be “consistent with the requirements of this subpart,” and thus must incorporate the superseding rule in § 550.1614(d). If agents are in their “control period” (i.e., have met retirement age and service requirements or are within 3 years of meeting those requirements), the average of assigned overtime supplement percentages over any 3-year period must be consistent with their career average overtime supplement percentage in order to protect the retirement fund.

§ 550.1615 – Pay Assignment Continuity

We received general comments regarding § 550.1615 and retirement-related matters.

One commenter made general comments on the obvious administrative complexities of implementing and administering the pay assignment continuity provisions of BPAPRA.

Three commenters noted CBP's actions to decertify some positions from receiving AUO pay will create a "gap" in pay received by agents spanning the period when AUO ceased being paid and continuing through the implementation of BPAPRA, which lowers the amount of retirement-creditable basic pay that agents receive during this period of time compared to what they expected. A commenter noted that this could reduce an agent's high-3 average pay. Another commenter asked if "pay reform has included a gap measure" to make up for the loss of AUO pay and noted that AUO decertification would result in agents not reaching their "high 3 target." This commenter suggested that any period when an agent's AUO pay was decertified should not be included in the calculation of the agent's high-3 average pay for retirement calculation purposes.

As noted in the Supplementary Information published with the proposed rule, various reviews indicated that AUO was being used improperly for some DHS employees, and DHS has taken actions to address the matter. The suggestions concerning ways to address the "gap" in retirement-creditable pay caused by the decertification of certain positions for AUO pay is beyond the scope of the regulations. There is no provision in BPAPRA to provide replacement retirement-creditable pay to agents occupying positions decertified from receiving AUO during the period covering the decertification until the implementation of BPAPRA. In addition, there is no legal authority to disregard a period of creditable service and retirement-creditable basic pay from consideration for the computation of the high-3 "average pay period" as if the period of service and the pay received during that service never existed. Under 5 U.S.C. 8331(4) and 8401(3), the high-3 "average pay period" is a period of 3 consecutive years of creditable service

during which an employee has his or her highest rates of retirement-creditable basic pay. The high-3 average pay is used in computing an employee's retirement annuity. In effect, the commenter's suggested solution appears to be an attempt to avoid the word "consecutive" in the statutory definition of "average pay." The calculation of the high-3 "average pay period" entails the consideration of all possible periods of 3 consecutive years of creditable service and retirement-creditable basic pay to determine which of the periods comprises the high-3 "average pay period." If decertification of an agent's position causes the agent's retirement-creditable basic pay to be less than what he or she otherwise expected, the high-3 "average pay period" may shift to a period of 3 consecutive years that is different from what would have otherwise comprised the high-3 "average pay period." Furthermore, we note that the statutory definition of the high-3 "average pay" does not always result in the high-3 "average pay" being based on an employee's final three years of creditable service, since an agent's high-3 average salary period is the period when the agent had his/her highest average retirement-creditable basic pay over 3 consecutive years of creditable service, whenever that is.

One commenter posed a series of questions about the effects of the regulation. First, the commenter asked how the Border Patrol Interim Pay (which excludes AUO pay) affects the control period. Second, the commenter asked if § 550.1615 means that an agent cannot be promoted after age 50 or after 22 years of service because a promotion would also "inflate" the high-3 average pay via a pay increase that would not have been paid into the retirement system over the agent's career. Third, the commenter asked whether a change of duty stations with different locality pay would not be allowed because an agent would make more money not previously paid into the retirement system. Fourth, the commenter asked whether, under the 2.5 percent consistency standard stated in the proposed rule, an agent who worked 17 years with 25

percent AUO, and who elected 12.5 percent (Level 2 regular tour of duty) or 0 percent (Basic regular tour of duty) for a year just prior to his or her last year of service before retirement, would not be allowed to elect 25 percent (Level 1 regular tour of duty) during that last year.

In response to the first question, once the new overtime program for Border Patrol agents takes effect on January 10, 2016, CBP must control an agent's tour assignments (and associated overtime supplements) during the "control period" that begins when the agent is within 3 years of meeting age and service requirements for an immediate retirement annuity. During the control period, the CBP must ensure that an agent's average overtime supplement during any 3-year period is consistent with the agent's career-average overtime supplement percentage. Under the proposed rule, an agent's career average is based solely on periods of time during which an agent is covered by the new overtime program. (See proposed § 550.1615(a)(3). See also discussion of this in the Supplementary Information of the proposed rule, 80 FR 34544.) Thus, under the proposed rule, the interim period of time when agents are not receiving AUO pay but are, instead, receiving overtime pay under standard title 5 overtime provisions (May 17, 2015-January 9, 2016) would not have affected the career average used during the control period. However, we have made significant changes to § 550.1615(a), which are discussed below. The changes will not result in any agent's career average overtime supplement being less than it would have been under the proposed regulations, since we are providing for the use of the greater of two computations, one of which is the computation used in the proposed regulations. As explained below, the other computation will consider an agent's whole career prior to the beginning of the control period; thus, that computation would be affected by the loss of AUO pay during the interim period.

In response to the second question, § 550.1615 has no effect on promotions. Section 550.1615 deals with CBP controlling tour assignments and the resulting overtime supplement percentage during an agent's control period. It focuses on the career-average overtime supplement percentage, not the dollar amount of the supplement or the total rate. OPM actuarial calculations that determine the level of agency retirement contributions take into account average salary growth due to grade progression.

In response to the third question, § 550.1615 has no effect on the ability of agents to make geographic moves. Section 550.1615 deals with CBP controlling tour assignments and the resulting overtime supplement percentage during an agent's control period. It focuses on the career average overtime supplement percentage, not the dollar amount of the supplement or the total rate. OPM actuarial calculations that determine the level of agency retirement contributions take into account average locality pay that reflects geographic moves.

In response to the fourth question, during an agent's control period, the CBP must ensure that an agent's average overtime supplement percentage during any 3-year period is consistent with (within 2.5 percentage points of) the agent's career-average overtime supplement percentage. Under the proposed regulations, an agent's career average is based solely on periods of time during which an agent is covered by the new overtime program. (See proposed rule at § 550.1615(a)(3)). See also discussion of this in the Supplementary Information of the proposed rule, 80 FR 34544.) Thus, under the proposed rule, prior periods of time when an agent was receiving AUO pay would not have affected the career average used during the control period. However, we have made significant changes to § 550.1615(a) in the final rule, which are discussed below. The changes will not result in any agent's career average overtime supplement being less than it would have been under the proposed regulations, since we are providing for the

use of the greater of two computations, one of which is the computation used in the proposed regulations. As explained below, the other computation will consider an agent's whole career prior to the beginning of the control period and would include an agent's AUO percentages in computing the career average overtime supplement.

The greater of the two computations will be used as the career average overtime supplement that will limit what tour and overtime supplement can be assigned to an agent during his or her control period. While an agent's retirement-creditable basic pay will be controlled during the control period, it is possible that some or all of an agent's high-3 average salary period will be outside that control period and could reach back to periods when an agent was receiving AUO pay, especially in the case of agents retiring in the next several years.

One commenter expressed the opinion that the regulations on pay assignment continuity are "particularly confusing and vague" and requested clarification. The commenter also stated that "controlling the work levels accessible to covered employees in the three-years before their retirement seem[s] discriminatory and arbitrary."

BPAPRA places the responsibility for developing and implementing a plan to ensure, to the greatest extent practicable, pay assignment continuity with CBP, subject to consultation with OPM. OPM's regulations provide a basic framework, metrics, and a consistency standard for CBP to utilize in the design of its plan. The only means under BPAPRA to maintain pay continuity is through CBP's plan to concurrently control the assignment of agents to one of three types of "regular tour of duty" which provide one of three rates of pay (reflecting an overtime supplement of 25, 12.5, or 0 percent). Therefore, the law requires that pay continuity be maintained through assignments of agents to one of three types of fixed "regular tour of duty"; other means of maintaining pay continuity are precluded by BPAPRA.

One commenter stated that “pay reform” is changing the “pension plan” and asked if there were “any plans to grandfather agents that have more than 10 years of service.” This commenter also asked where “the language that spells out and authorizes the drastic changes to the current retirement/pension plans for Border Patrol Agents” could be found in BPAPRA.

BPAPRA makes only one significant change to subchapter III of chapter 83 of title 5, United States Code, the provisions for the Civil Service Retirement System (CSRS), and chapter 84 of title 5, United States Code, the provisions for the Federal Employees’ Retirement System (FERS). Section 2(d) of BPAPRA amends the definition of “basic pay” for CSRS and FERS retirement purposes to provide that a Border Patrol overtime supplement is basic pay for retirement purposes. (See also 5 U.S.C. 5550(d).) Section 2(b) of BPAPRA added a new section 5550 in title 5, which includes a pay assignment continuity provision in section 5550(b)(1)(G). That provision requires that an agent’s average overtime supplement during the agent’s control period be consistent with the agent’s career average overtime supplement in order to protect the retirement fund and provide equitable treatment of agents. By design, BPAPRA has an effect on agents’ retirement-creditable basic pay, which in turn affects the agents’ high-3 average pay used to compute the agents’ retirement annuity. BPAPRA included no grandfathering provision related to retirement matters.

Another commenter raised issues with the designation of certain Border Patrol positions as headquarters positions that are only entitled to the Basic border patrol rate of pay. This comment refers to determinations made by CBP that are beyond the scope of the regulations.

One commenter was concerned about the “cryptic, opaque language” describing the high-3 “average pay period” in the proposed rule, and in the Supplementary Information published with the proposed rule. This commenter asked for a clarification of the concept of the high-3

“average pay period.” Under 5 U.S.C. 8331(4) and 8401(3), the high-3 “average pay period” is a period of 3 consecutive years of creditable service during which an employee has his or her highest rates of retirement-creditable basic pay. Further explanation of the high-3 “average pay period” is provided in the context of our responses to other comments.

One commenter asserted, generally, that the pay assignment continuity provisions at § 550.1615 are unjust, unfair, and are “OPM’s attempt to further harm the U.S. Border Patrol by implementing ideas and standards that are not in the law.” The pay assignment continuity provisions are an implementation of the statute at 5 U.S.C. 5550(b)(1)(G). Within the statutory framework provided by Congress, we have striven to implement the law in a reasonable and fair way, while also recognizing OPM’s fiduciary responsibilities to protect the retirement fund.

One commenter asked, generally, how BPAPRA will affect retirement, specifically the high-3 “average pay period” used in retirement annuity calculations. How BPAPRA affects the computation of an agent’s high-3 “average pay period” of an agent will depend on the particular work and pay history of the agent. In general, because of the statutory requirement that generally no more than 10 percent of agents at a location may have a Level 2 or Basic regular tour of duty, most agents should be consistently assigned to Level 1 regular tour of duty, and their high-3 average pay will reflect that. BPAPRA does require that an agent assigned to a headquarters, administrative, training instructor, or fitness instructor position be assigned a Basic regular tour of duty (with no overtime supplement), except as otherwise justified based on a CBP staffing analysis or the need to comply with the pay assignment continuity provision. This statutory requirement might affect the amount of retirement-creditable additional pay that the agent would otherwise receive.

We also received comments on specific sections of the proposed rule. Several commenters, including CBP, had concerns about proposed § 550.1615(a)(3), which provided, in part, that “[i]f an agent is in a control period...when the provisions of this subpart first become applicable to the agent, the agent’s initially assigned overtime supplement percentage must be considered the agent’s career average.” One commenter believed that proposed § 550.1615(a)(3) appears to artificially compute an agent’s career average. Other commenters were concerned that this provision would harm agents who are in their control period when BPAPRA is implemented and who are assigned to positions at the Office of Border Patrol Headquarters, the CBP Border Patrol Academy, and other positions generally excluded from a Level 1 or Level 2 regular tour of duty. CBP and one commenter noted that it will be difficult to find agents willing to accept assignments to headquarters, and other positions limited to a 0 percent overtime supplement. A commenter also noted that these agents in headquarters, administrative, training instructor, or fitness instructor positions can only be assigned to a Basic regular tour of duty despite the fact that they have been working a large amount of overtime in the field for many years. Another commenter stated that agents working in a headquarters or academy position would be harmed by the implementation of the pay assignment continuity regulation. For example, some agents would have a career average overtime supplement “locked” at 0 percent because they will already be in their control period and have a Basic tour (due to holding a headquarters position) when BPAPRA takes effect, even if they later work another 5, 8 or 10 years out in the field. The commenter pointed out that these agents may have been working significant overtime (and receiving AUO pay) over most of their career and stated that all hours of overtime worked during the agents’ career should be considered.

One of the most challenging implementation issues BPAPRA presents is the logical quandary of how to establish a *career average border patrol rate of pay* for agents who are immediately in their control period when BPAPRA is implemented, when no agent will have any history of being paid under 5 U.S.C. 5550. As a solution (hereafter “Option 1”), one commenter proposed that an agent “should be allowed to choose their level of overtime supplement, but at retirement then OPM can determine if those years were inflated compared to the rest of his/her career. If they were, then there should be a calculation as to the average over the previous ten years, or something to that effect. If he/she has regularly worked 15-25 hours of overtime whether on AUO or FEPA, and is at level 1 at retirement, then there is no artificial inflation.”

Another commenter proposed a second solution (hereafter “Option 2”) to address the problem of establishing a career average border patrol rate of pay for agents who are in their control period and who are assigned to a headquarters, administrative, training instructor, or fitness instructor position restricted to a Basic regular tour of duty. Option 2 would create a “waiver period” until the comprehensive staffing analysis CBP is required to complete under section 2(e) of BPAPRA is completed. During the proposed “waiver period” an agent’s retirement high-3 average pay would be “based off of whatever election they chose, even though they may be in a Headquarters, Instructor, etc., position.”

The proposed Option 1 solution is not consistent with the statutory framework because it would necessitate a determination, after the fact, regarding whether the agent artificially inflated his or her average pay for the purposes of increasing his or her annuity. BPAPRA does not provide OPM with authority to modify an employee’s retirement-creditable basic pay or high-3 average pay. Limiting the creditability of the overtime supplement to an average amount over some period of years would conflict with 5 U.S.C. 5550(d), which provides that “[a]ny pay in

addition to the basic border patrol rate of pay for a border patrol agent resulting from application of the level 1 border patrol rate of pay or the level 2 border patrol rate of pay” shall be treated as basic pay for retirement purposes. The only means under BPAPRA to maintain pay continuity is through CBP’s plan to concurrently control the assignment of agents to one of three types of “regular tour of duty,” which provides one of three rates of pay (reflecting three levels of overtime supplement).

The proposed Option 2 solution is also legally impermissible. The comprehensive staffing analysis CBP is required to complete under section 2(e) of BPAPRA might determine that certain headquarters, administrative, training instructor, or fitness instructor positions at certain duty stations require assignment to other than a Basic border patrol rate of pay. However, there is no assurance that this would be the result of the comprehensive staffing analysis for every affected position. If we attempted to set a waiver period of a fixed length, it would be viewed as arbitrary and would leave some agents just outside the period who are arguably just as deserving of the special treatment. Furthermore, one important implementation issue under BPAPRA regarding pay continuity is how to establish a career average border patrol rate of pay for agents who are immediately in their control period when BPAPRA is implemented when no agent has any history of having received pay under 5 U.S.C. 5550. A “waiver period” where the agent’s retirement high-3 average pay would be based on whatever election they chose (with no relationship to what the agent actually receives as retirement-creditable pay) does not address the issue of how to establish the career average of an agent who is immediately in his or her control period, especially for those who are limited to the Basic border patrol pay rate when BPAPRA is implemented. Section 5550(b)(1)(G)(i) requires use of the average border patrol rate of pay level “to which the border patrol agent has been assigned”—not the level the employee elected,

but was not actually assigned. Option 2 also conflicts with what is permitted by the statutory definitions of “basic pay” and “average pay.” “Basic pay” for retirement is pay actually received for which retirement deductions and agency contributions have been paid to the retirement fund. “Average pay” is the 3 consecutive years of creditable service during which an employee has his or her highest rates of retirement-creditable basic pay. These definitions do not permit basic pay to be deemed to have been received, and deeming basic pay, without employee retirement deductions or agency contributions, would itself produce an unfunded liability of the retirement fund.

Another commenter and CBP suggested that any period, of any length of time, when an agent cannot be assigned to a Level 1 or Level 2 regular tour of duty (and a 25 or 12.5 percent overtime supplement) should be excluded from calculation of the agent’s career average overtime supplement. However, it is not possible to disregard periods of pay within an agent’s career and still be consistent with the goals of pay assignment continuity provisions of BPAPRA.

CBP expressed concerns about § 550.1615 similar to those expressed by other commenters. CBP’s comments on this aspect of the proposed rule focused on language of the pay assignment continuity provisions of BPAPRA which state the purpose of the provisions are to assure that an agent is “not able to artificially enhance his/her retirement annuity.” CBP argued that limiting consideration of the agent’s career for pay assignment continuity only to time under Border Patrol rate of pay is inherently unfair to those agents who are currently at or near the control period on the effective date of BPAPRA and who are assigned to positions statutorily limited to Basic rate of Border Patrol pay because these agents will forever be limited to the Basic tour of duty regardless of how many additional years the employee continues to

work as a Border Patrol agent. CBP noted that these agents, along with the agency, have already paid years of retirement contributions to the retirement fund based on AUO pay.

CBP also expressed concern that agents assigned to a position (such as headquarters, at training facilities, or in initial training) that is precluded, by statute or regulation, from receiving other than Basic border patrol rate of pay, or was similarly precluded from receiving AUO pay (available to other Border Patrol agents) that would have been included in their basic pay for retirement purposes, would experience a reduction of their career average because they will have the periods of 0 percent overtime supplement percentage factored into their career average calculation. CBP noted that this would discourage agents from accepting assignments to headquarters, administrative, training instructor, or fitness instructor positions.

CBP stated that “the stated statutory language [concerning pay assignment continuity] is too simplistic to comport with the clear statutory purpose [i.e., to assure that an agent is “not able to artificially enhance his/her retirement annuity.”].” CBP argued that the career average intended by Congress allows the regulatory provisions establishing an agent’s career average to not be limited to overtime under the BPAPRA. CBP reasoned that this is permissible, particularly considering agents who have already completed the majority of their careers (and made attendant deposits into the retirement fund) based on AUO pay, in light of statutory language which provides that an agent’s pay should be consistent with “the average border patrol rate of pay level to which the border patrol agent has been assigned during the course of the career of the border patrol agent.” CBP’s argument relied on the dictionary definition of the word “career,” which, in CBP’s analysis, requires consideration of pay prior to implementation of the new overtime supplement. CBP argued that the statutory language, which provides that pay assignment continuity is to be achieved “to the greatest extent practicable,” implies some

leeway in setting rules. CBP also noted that the general purpose of the pay assignment continuity provision is to prevent an agent from artificially enhancing his or her annuity, which should be the guide for establishing rules. In general, CBP argued that consideration of AUO as career pay is within the spirit of pay assignment continuity and that AUO is, in fact, basic pay for retirement and cannot be considered an “artificial” enhancement of an agent’s retirement benefit.

CBP suggested several alternative changes to the regulations. First, CBP proposed that “[a]t a minimum, CBP believes it should be free to consider AUO pay at least since the start-up of DHS (when CBP has clear electronic pay records [i.e., from CY 2003]) for those individuals who will have less than 4 years under border patrol pay at the time they are within 3 years of retirement eligibility and, because of their assigned positions they are not free to receive other than basic border patrol rate of pay.” As another alternative, CBP suggested that OPM define “career” for the purpose of the regulations as a period of at least 10 years under the Border Patrol rate of pay or AUO as the minimum basis of what constitutes a career, but only for those employees who are currently at or near the control period and who hold a position that is required by law to have a Basic tour with a 0 percent overtime supplement. CBP suggested a 10-year career because it roughly coincides with the period for which DHS has electronic pay records.

Alternatively, CBP suggested, “in light of Congressional intent that the agent not be able to ‘artificially enhance’ their own retirement annuities,” that the rule should be changed to define career “to exclude periods when the agent, for the good of the agency (and not of their own volition), is assigned to a position (such as headquarters, at training facilities, or in initial training) that is precluded, by statute or regulation, from receiving other than basic border patrol

rate of pay or was similarly precluded from receiving other overtime pay (available to other border patrol agent) that would have been included in their base pay for retirement purposes.”

CBP suggested another alternative for employees who have more than 20 years of service as a Border Patrol agent. CBP suggested allowing consideration of only the 20 years that produced the employee’s largest percentages of AUO pay and the Border Patrol overtime supplement in determining the career average.

We understand CBP’s concerns; however, we emphasize that the underlying purpose of pay assignment continuity provisions of BPAPRA—the purpose behind the objective of ensuring that “agents are not able to artificially enhance their retirement annuities” (5 U.S.C. 5550(b)(1)(G)(iv))—is ultimately to protect the Civil Service Retirement and Disability Fund. To make this express, we have added the goal of protecting the retirement fund to § 550.1615(a)(1). We note that section 5550(b)(1)(G)(i) requires that tour assignments during an agent’s control period be consistent with the “average border patrol rate of pay level to which the border patrol agent has been *assigned*” during the agent’s career up to that point, regardless of how that tour was assigned. The pay assignment continuity provision is designed to protect the retirement fund by controlling tour assignments (including those made by employee elections) during the control period, which in turn controls the overtime supplement percentages during that control period, thus ensuring consistency with the career average.

After considering all of the comments on § 550.1615, we have decided to change § 550.1615 to establish a rule for computing the career average overtime supplement percentage that we believe is a reasonable interpretation of the statute and that is consistent with legislative intent. This rule will operate so as not to artificially inflate or deflate retirement calculations, while providing fair treatment of agents. In this final rule, § 550.1615(a)(2) has been changed so

that the career average overtime supplement percentage of an agent is the greater of (1) the average overtime supplement percentages (25 percent, 12.5 percent, or 0 percent) assigned during service as an agent on or after January 10, 2016, that is prior to the beginning of the agent's control period; or (2) the average of the assigned overtime supplement percentages during all service as an agent that is prior to the beginning of the agent's control period, with assigned overtime supplement percentages (25, 12.5, or 0 percent) assigned during service on or after January 10, 2016, and with assigned percentages of AUO under 5 U.S.C. 5545(c)(2) treated as overtime supplement percentages for any period of service prior to January 10, 2016. This change addresses the concerns expressed by CBP and various individual commenters. The first method is the same that was included in the proposed regulations. Because of the "greater of" approach, no agent will be treated worse than he would have been treated under the proposed rule, and some agents will be treated better. For example, agents who have a Basic tour under the new overtime program established under BPAPRA, but who had years of service before January 2016 during which they received 25 percent AUO pay, will have their career average based on their total Border Patrol agent career prior to the beginning of their control period; thus, the career average will reflect the years when 25 percent AUO pay was received.

The second method is based on an interpretation of section 5550(b)(1)(G)(i) that gives weight to the language "course of the career" by reaching back to the portion of an agent's career before the BPAPRA overtime program takes effect on January 10, 2016. Since both AUO pay and the Border Patrol overtime supplement are retirement-creditable basic pay, inclusion of AUO pay is appropriate and fair and does not have a negative impact on the retirement fund. Given the extremely negative impact that considering only periods on or after January 1, 2016, in computing the career average would have had on certain agents and given the lack of any

apparent Congressional intent to create such a negative impact, we concluded it would be reasonable to create a second method, while preserving the first method that relied on a narrower reading of the statutory language. The “greater of” approach ensures that no employee is disadvantaged.

The revised § 550.1615(a)(3) addresses a matter previously addressed in § 550.1615(a)(2) of the proposed regulations. Paragraph (a)(3) provides that, in applying 550.1615(a)(2), the assigned overtime supplement percentage is used regardless of whether or not the payable amount of the overtime supplement is limited by a premium pay cap. This protects an agent’s career average from decreasing when a pay cap is imposed.

Section 550.1615(a)(4) has been added to provide that, in applying paragraph (a)(2) of this section, if an agent’s control period begins on January 10, 2016, the agent’s initially assigned overtime supplement percentage must be considered the agent’s career average under § 550.1615(a)(2)(i). This provision is consistent with the second sentence in § 550.1615(a)(3) of the proposed rule.

A sentence has been added at the end of § 550.1615(b) to clarify that if, as of January 10, 2016, the date that is 3 years before the agent first met age and service requirements for an immediate retirement has already passed, then the agent’s control period is considered to have begun on January 10, 2016.

In deciding on the revisions to § 550.1615 described above, we have necessarily had to reject the other alternative changes suggested by CBP and other commenters. We do not believe that it is reasonable to limit the definition of “career” for the purpose of the regulations as a period of at least 10 years under section 5550 or the AUO program simply because the electronic payroll records of DHS are conveniently available for this period. OPM has made its electronic

retirement records available to DHS, which should allow CBP access to information more than 10 years old. As we explained in response to other commenters, the goals of pay assignment continuity do not allow periods of 0 percent overtime supplement to be disregarded for the calculation of an agent's career average overtime supplement or the high-3 average pay. We appreciate the difficulties presented by the statutory exclusion of headquarters, administrative, training instructor, or fitness instructor positions from being assigned to Level 1 or Level 2 regular tours of duty, at least in the absence of a CBP staffing analysis allowing those assignments, but that is a consequence of the law which regulations cannot remedy.

One commenter expressed concern about the definition of *control period* at § 550.1615(b) and length of time he or she would have to spend in the control period. This commenter was also concerned about a statement made in the Supplementary Information published with the proposed rule regarding the two exceptions allowed at § 550.1615(c)(2) to the requirement that an agent's career average overtime supplement must be "consistent" with the agent's assigned overtime supplement during *all consecutive 3-year periods within the "control period."* We stated: "We cannot allow an agent whose overtime supplement is not affected by the premium pay cap to voluntarily elect a lesser percentage during the control period, since the agent could later elect again to have a higher percentage that is consistent with his/her career average. While the overtime supplement used in the agent's high-3 average pay would not exceed a percentage that is consistent with the agent's career average, the agent (and CBP) will have made inadequate retirement contributions during the portion of the control period when the lesser percentage was in effect." The commenter noted that he or she will be eligible for retirement in 6 years but will not be mandated to retire for 16 years. The commenter stated: "If this statement along with the entire section covering Pay Assignment Continuity 550.1615 stands

as written I will be forced to maintain 1 overtime level for the duration of my career starting in 3 years and potentially continuing for 13 more years as the entire time in service will be considered a control period.” CBP, however, stated that it “agree[d] with OPM both that the ‘statutory language cannot logically be interpreted as establishing a control period only during the 3 years preceding the date an agent meets age and service requirements,’ and that the primary reason for the provisions under 5 U.S.C. 5550(b)(1)(G) are to assure that the employee is ‘not able to artificially enhance his/her retirement annuity.’” As we explained in the Supplementary Information for the proposed rule, OPM interprets the “eligible for immediate retirement” language in section 5550(b)(1)(G)(i) to refer to eligibility based on meeting all eligibility requirements, including the condition of separation from service. Since an employee’s future separation date is unknown, all possible 3-year periods preceding all possible separation dates are included in the control period. (See 80 FR 34543-34544.) This approach achieves the desired objective of controlling agents’ high-3 average pay based on the last 3 years of service.

One commenter expressed concern that agents who consistently have a Level 1 tour and are promoted to grade GS-15 where they are reaching the premium pay cap will be unfairly forced to continue to work a Level 1 tour because they have a high career average overtime supplement percentage and must be consistent with that. The commenter pointed out that, because of the premium pay cap, the agent will still be depositing the same amount of money into the retirement account whether he/she is at the Level 1 or the Level 2. The commenter recommended that such agents be allowed to have a reduced tour.

This issue was already addressed in the proposed regulations. Under § 550.1615(c)(2)(i) (in both the proposed and final regulations), if an agent’s overtime supplement is limited by the premium pay cap, the agent may elect a regular tour of duty with lesser hours providing an

overtime supplement that is less than the agent's career average, as a permitted exception to the consistency requirement.

NBPC commented that the definition at § 550.1615(b) of "control period" would control an agent's overtime supplement assignments for many years. NBPC suggested that lengthy control periods could be instead addressed by "a process by which an Agent would acknowledge that he or she does not intend to retire at the first eligible date and instead state an anticipated retirement date."

The supplementary information published with the proposed rule includes a lengthy explanation of our statutory interpretation for the definition of "control period" in the rule. (See 80 FR 34543-34544.) The regulations allow a 2.5 percent variation between an agent's career average overtime supplement and the agent's assigned overtime supplement to allow for a reasonable divergence between the two averages.

NBPC's proposed suggestion concerning the definition at § 550.1615(b) of "control period" is not a practical solution to the potential problem of agents "artificially enhance[ing] their retirement annuities." An agent could, with the best of intentions, decide on an anticipated retirement date, only to see his or her personal circumstances change unexpectedly, necessitating a sudden change in his or her retirement date. An employee's decision to retire at a certain date can be revoked as late as the planned last day of service. This could result in the agent never being subject to pay assignment continuity before his or her retirement.

NBPC also commented on the relationship between § 550.1615 and § 550.1614(d), which addresses CBP's authority in connection with the pay assignment continuity requirement. Section 550.1614(d) provides that the pay assignment continuity requirement in § 550.1615 trumps that requirement in § 550.1614, which regulates the statutory requirement that, except

when justified based on a CBP staffing analysis, no more than 10 percent of agents stationed at a location may be assigned a Level 2 or Basic regular tour of duty (i.e., at least 90 percent of agents at a location must be assigned a Level 1 regular tour of duty). The NBPC commented, “[t]he idea that pay continuity trumps the staffing requirement, or any operational requirement or necessity, is completely contrary to the expressed intent of Congress. Throughout the entire legislative process the primary concern that Congress articulated with the BPAPRA was whether it would diminish border security... [T]he NBPC and the Administration proposed that the legislation be altered to provide that at least 90% of the Agents must be at Level 1 to ensure that Border Patrol had adequate manpower.”

The purpose of the statutory provision at 5 U.S.C. 5550(b)(1)(E), the statutory requirement that, except when justified based on a CBP staffing analysis, no more than 10 percent of agents stationed at a location may be assigned a Level 2 or Basic regular tour of duty, is to “ensure that the Border Patrol has a stable floor of staffing, allowing managers with a steady annual base-line of hours to plan border security operations.” S. Rep. No. 113-248, at 9. In addition, the NBPC comment does not consider that the statutory provisions of pay assignment continuity include the provision at 5 U.S.C. 5550(b)(1)(G)(ii) of title 5, United States Code, which provides:

(ii) Implementation.—Notwithstanding any other provision of law, U.S. Customs and Border Protection may take such action as is necessary, including the unilateral assignment of border patrol agents to the level 1 border patrol rate of pay, the level 2 border patrol rate of pay, or the basic border patrol rate of pay, to implement the plan developed under this subparagraph.

(emphasis added) This statutory provision is discussed in the supplementary information (at 80 FR 34544, June 17, 2015). The introductory phrase of § 5550(b)(1)(G)(ii)—“Notwithstanding any other provision of law”—is the statutory basis for § 550.1614(d) providing that the pay assignment continuity requirement in § 550.1615 takes precedence over the percentage limit requirement in § 550.1614. For clarification, we are revising § 550.1614(d)(1) by adding the phrase “notwithstanding any other provision of law or this subpart,” consistent with the § 5550(b)(1)(G)(ii) statutory provision upon which paragraph (d) is based.

As noted in the Supplementary Information for the proposed regulations, § 550.1615(d)(2) implements the provision in 5 U.S.C. 5550(b)(1)(G)(vi), which states that nothing in section 5550(b)(1)(G) may be construed to limit the ability of CBP to assign regular tours as necessary to meet operational requirements. Section 550.1604, reflects various provisions in BPAPRA (section 2(a) and 2(f)(1) of BPAPRA and 5 U.S.C. 5550(g)) that make clear that CBP has authority to assign unscheduled work as needed to meet mission needs and operational requirements, notwithstanding the regular tour assigned to agents. Thus, as a general matter, OPM does not consider the need to meet operational requirements as preventing CBP from also controlling agents’ regular tour as necessary to comply with the pay assignment continuity requirement. As necessary to meet its operational requirements, CBP may assign outside-tour overtime work to an agent whose tour is limited due to the pay assignment continuity provision. Given the comments regarding the extent to which the pay assignment continuity takes precedence over other rules governing tour assignments, we are further clarifying in § 550.1615(d)(2) that, before exercising the authority in paragraph (d)(2) to allow assignment of a regular tour of duty that does not comply with the pay assignment continuity plan, CBP must first determine that it cannot adequately address the specific operational

requirements in question by other means. For example, CBP could assign the affected agent outside-tour overtime work to address the specific operational requirements at issue. Also, CBP could possibly assign outside-tour overtime work to other agents to meet those work requirements. As part of the clarification of § 550.1615(d)(2), we have added language stating that, if the authority under paragraph (d)(2) is exercised, CBP must return the affected agent to a regular tour of duty that complies with pay assignment continuity plan as soon as possible.

CBP also noted the statutory primacy of pay assignment continuity requirements and asked if pay assignment continuity would take precedence over the statutory requirement that agents in certain positions (i.e., a headquarters, administrative, training instructor, or fitness instructor position) can only be assigned a Basic border patrol rate of pay and a 0 percent overtime supplement.

The introductory phrase of § 5550(b)(1)(G)(ii)—“Notwithstanding any other provision of law”—allows an agent who is assigned to a headquarters, administrative, training instructor, or fitness instructor position during their control period to be assigned to a Level 1 or Level 2 border patrol rate of pay, if such an assignment is required to maintain pay assignment continuity under the plan developed by CBP.

NBPC also commented on § 550.1615(c), which provides that the average overtime supplement for all consecutive 3-year periods within the “control period” is considered to be “consistent” with the career average percentage of overtime supplement if the two averages are within 2.5 percentage points of each other. NBPC faults the regulations because “[n]owhere in the proposed regulations is there an explanation for how OPM determined this 2.5 [percent] metric... The NBPC believes that a more reasonable metric would be to use the level at which an agent spends half or more of his or her career.”

We do not view half of a career as a reasonable interpretation of the word “consistent” with the “average border patrol rate of pay level . . . assigned during the course of the career of the border patrol agent” (5 U.S.C. 5550(b)(1)(G)(i)). A simple example shows how the NBPC’s proposed alternative would not produce consistency. In this example, an agent enters the control period after serving 20-years as an agent, where the agent was assigned a 25 percent overtime supplement for 10 years and a 0 percent overtime supplement for 10 years. Under the proposed rule, the career average would be 12.5 percent; however, NBPC’s proposed alternative would allow the agent to have a 25 percent overtime supplement during the control period, which would not be consistent with the career average and would not protect the retirement fund.

OPM continues to believe that it is reasonable to allow an agent’s average overtime supplement percentage during any 3-year period within the agent’s control period to be considered “consistent” if it is within 2.5 percentage points of the agents’ career average overtime supplement percentage. In our view, requiring a 0 percentage point difference would not be feasible given that the CBP can only affect the average during the control period by using combinations of 25, 12.5, and 0 percent overtime supplements. On the other side, we do not view a 5 percentage point difference as close enough to be considered consistent. However, the final rule provides that CBP must provide reports so that OPM can evaluate whether the CBP’s pay assignment continuity plan and the 2.5 percent consistency requirement are adequately protecting the retirement fund.

§ 550.1616 – Corrective Actions

NBPC requested clarification of § 550.1616, which addresses corrective actions in connection with tour assignments and allows retroactive corrections in cases of fraud or fault on the part of the agent. NBPC stated the proposed regulation should be changed to also allow for

retroactive correction of tour assignments when (1) an agent worked the requisite hours but has not been paid properly (e.g., working Level 1 hours but only being provided Level 2 pay) and (2) an agent elected to work a higher level tour but the agency erroneously did not assign it. NBPC was concerned that the proposed regulation would relieve CBP for any liability for financial detriment to an agent.

We agree that clarification is needed. First, let us address the two scenarios raised by NBPC. First, NBPC described a scenario in which agents worked the “requisite hours” but did not receive pay for those hours, such as working Level 1 hours but getting Level 2. In fact, it is possible for an agent who elected Level 2 to be assigned outside-tour overtime hours that result in the agent having in some pay periods aggregate hours that may be equivalent to those of a Level 1 tour. However, that does not change the tour that the agent elected and that, by law, must be implemented. No retroactive correction would be appropriate. By law, if an agent works overtime hours beyond the assigned tour, the agent is entitled to overtime pay (for regularly scheduled overtime) or compensatory time off (for irregular overtime hours). Thus, the agent will receive compensation for those outside-tour overtime hours, but any regularly scheduled overtime pay received will not be retirement-creditable basic pay.

Second, NBPC described a scenario in which an agent elected to work a higher level tour but the agency erroneously did not assign it. We did not intend to bar retroactive correction in cases where CBP failed to implement an employee’s valid tour election (when no superseding tour assignment applies under § 550.1611(f)). We would expect an employee to quickly identify such an error after receiving a Leave and Earnings Statement for an affected pay period. However, there could be a short period of time during which the payroll system improperly pays the employee before the error is corrected. In such a case, a retroactive correction should be

made, since the employee made a valid election, which must be implemented (absent a superseding rule). If, as expected, the employee worked the correct tour despite the payroll system error, the retroactive correction will be simple.

Upon review of proposed § 550.1616, we believe that the bar on retroactive corrections is too broadly stated. We are revising § 550.1616 to specifically identify circumstances in which retroactive correction of a tour assignment may not be made. In other situations involving assignment of an incorrect tour (whether an error in terms of the actual scheduling of work or merely an error in payroll system), a retroactive correction will be required and appropriate adjustments in pay (including adjustments in retirement contributions) must be made. If the employee was underpaid, the normal principles governing back pay under 5 U.S.C. 5596 and 5 CFR part 550, subpart H will apply. If the employee was overpaid, the debt will be subject to collection under normal debt collection procedures (including 5 U.S.C. 5514 and 5 CFR part 550, subpart K).

We reviewed possible scenarios in which an agent might be assigned the incorrect tour, including failure to implement a valid election or to apply the superseding rules in § 550.1611(f) or § 550.1622(b). We determined that the bar on retroactive corrections of a tour assignment should be limited to two scenarios: (1) misapplication of the consistency requirement under the pay assignment continuity provision and (2) misapplication of the 10 percent limit (or authorized alternative limit) on the number of agents at a location with a Basic or Level 2 tour. The bar on retroactive correction does not apply if the error is related to fraud or misrepresentation on the part of the affected agent. These scenarios are defined as involving a tour assignment error that is an error in the actual scheduling of work, not just a payroll system error. Both of these scenarios involve mathematical computations in determining the appropriate tour assignment.

Mathematical errors could go undetected for a long period and it would be disruptive to retroactively change a tour assignment under these circumstances. An erroneous tour assignment in connection with the percentage limitation described in § 550.1614 could also be due to misapplication of selection procedures established under § 550.1613. Under § 550.1614, CBP could force one agent to have a Level 1 tour instead of a preferred shorter tour, while another agent would get a preferred shorter tour. If those tour assignments were incorrect due to a CBP error in applying selection procedures, the error would be corrected prospectively. However, CBP would not retroactively change the Level 1 tour assignment for the agent who worked that tour, nor would CBP retroactively change the other agent's preferred shorter tour to a Level 1 tour.

Retroactive tour assignment corrections would be possible with respect to determinations regarding whether an agent should or should not be categorized as (1) a canine handler under § 550.1611(f)(1), (2) unable to perform overtime on a daily basis under § 550.1611(f)(2), or (3) holding a headquarters or other position requiring a Basic tour under § 550.1611(f)(3). Making determinations under these provisions is more straightforward, and tour assignments should be consistent with the agent's actual status. The retroactive correction could result in an agent being assigned a longer or a shorter tour.

§ 550.1621 – Rules Governing Pay for Agents on Level 1 or 2 Tour

A few commenters were concerned that an agent with a Level 1 or 2 tour would accrue an overtime hours debt if the agent takes a full day of leave (e.g., annual, sick, or military leave). They believe it would be unfair to be required to make up for overtime hours associated with a day of leave.

This concern is misplaced. The BPAPRA law and regulations provide that there is no accrual of an overtime hours debt on a day when an agent is on leave for the full 8-hour basic workday. By law, the obligation to work within-tour overtime on a regular workday (2 hours for Level 1, and 1 hour for level 2) applies only if the agent performs “work” during the 8 hours of regular time on that same day. (See § 550.1621(a)(3), (b)(3), and (e).)

Another commenter expressed concern that pay received during paid leave would not include overtime pay. This commenter understood that there was no obligation to work overtime during a full-day of leave; however, he thought that the exclusion of those hours would affect the pay received during paid leave.

This concern is also misplaced. An agent with a Level 1 or 2 tour will receive the applicable overtime supplement during periods of paid leave. An agent’s overtime supplement (25 percent or 12.5 percent) is computed by multiplying the applicable percentage times the agent’s hourly rate of basic pay and multiplying the result times the number of paid hours of regular time in the pay period (subject to the biweekly premium pay cap). (See § 550.1621(a)(4) and (b)(4).) Paid hours of regular time would include any paid hours of leave during that time. Thus, for example, if an agent with a Level 1 tour is on paid leave for the full 80 hours of a biweekly pay period, the overtime supplement will equal 25 percent of the agent’s biweekly rate of basic pay (subject to the biweekly premium pay cap). The fact that the agent does not have any obligated overtime hours during full days of paid leave has no effect on the computation of the overtime supplement, since the overtime supplement is based on the number of paid regular time hours.

While a number of commenters were critical of the fact that BPAPRA provides the equivalent of “straight pay” (i.e., regular rate of pay with no overtime premium) for within-tour

overtime through the payment of the overtime supplement, the commenters did not consider the added value of receiving overtime pay during periods of paid time off (including paid leave and paid holiday time off) when no overtime is worked. Based on available data, on average, a Federal employee might use about 340 hours of paid time off during a year. Thus, during the course of a year, a typical agent might receive extra pay equal to 25 percent of his or her rate of basic pay for 340 hours, attributable to receiving credit for overtime pay during paid leave hours, which produces extra annual pay equal to about 4 percent of total annual basic pay. In addition, commenters did not recognize the added value of the overtime supplement being treated as retirement-creditable basic pay—a treatment that is contrary to normal retirement rules that exclude overtime pay from basic pay (5 U.S.C. 8331(3)). Based on the FERS normal cost contribution rates, treating a 25 percent overtime supplement as retirement-creditable basic pay has a present value of about 7 percent of total annual basic pay.

CBP expressed concern that the substitution of overtime hours for absences during the regular tour of duty might be misconstrued as supplanting the normal management functions related to approval of absences. CBP recommended that OPM confirm in the regulations that absences during the regular tour of duty (in particular, during obligated overtime hours) are subject to approval by the employee's supervisor.

We do not believe we need to add anything to the regulations regarding the fact that absences during the basic workweek are subject to management approval under agency policies. (Management handling of absences is not specifically addressed in law or OPM regulations, but is left to agency policies established under the agency head's broad authority to manage agency employees under 5 U.S.C. 301-302.) The existence of a leave without pay substitution rule in 5 CFR 550.112(d) has never raised any issues regarding the need for management approval of

absences during the basic workweek. However, we recognize that the concept of obligated overtime hours under the Border Patrol overtime program is new and unique. Therefore, to avoid any confusion, we are adding a paragraph (f) in § 550.1621, which expressly states that any absence during obligated overtime hours is subject to management approval under CBP policies. This is consistent with the treatment of absences during the basic workweek.

CBP expressed concern that, under the proposed regulations, an agent with a Level 1 or 2 tour could use 8 hours of compensatory time off during regular time and not have an overtime obligation on that same day, since an overtime obligation is triggered only when an agent performs “work” during regular time. CBP viewed this as essentially providing an agent with 10 hours of paid time off when the agent was charged for only 8 hours of compensatory time off. CBP offered the view that this outcome was contrary to BPAPRA section 2(f), which provides that nothing in the Act shall be “construed to require compensation of a border patrol agent for hours during which the border patrol agent is actually performing work or using approved paid leave or other paid time off”—since it believed the language in 5 U.S.C. 5542(g)(5)(C) could be interpreted to mean that compensatory time off is not “paid time off.” CBP also asserted that providing 10 hours of paid time off for 8 hours of compensatory time off was in conflict with 5 U.S.C. 5542(g)(5)(D), which precludes an agent from receiving “any cash value” for compensatory time off, and with 5 U.S.C. 5542(g)(1)(B)(ii) and (g)(2)(B)(ii), which provide that an agent receives compensatory time off for an equal amount of irregular overtime work. CBP recommended that OPM revise its regulations in § 550.1621 to provide that usage of compensatory time off constitutes “work” in applying § 550.1621(a)(3) and (b)(3) similar to the way that OPM provided that union “official time” is work for that purpose. (See § 550.1621(e).)

We do not agree with CBP's analysis or its recommendation. Use of compensatory time off excuses an agent from duty only during regular time (i.e., the 8-hour basic workday). An agent is getting 8 hours of paid time off in exchange for using 8 hours of compensatory time off. The rule in question—providing that an agent with a Level 1 or 2 tour has a within-tour overtime obligation only on a day on which the agent performs work during regular time—deals with the overtime supplement and the hours obligations associated with that supplement. The overtime supplement is not paid on an hour-for-hour basis, but is paid for a set of “obligated overtime hours” where the obligation accrues under specific conditions. The number of obligated overtime hours can vary pay period to pay period. For example, for an agent with a Level 1 tour, the number of obligated overtime hours in a biweekly pay period may range anywhere from 0 to 20 hours. The rule that an overtime obligation is created only when an agent with a Level 1 or 2 tour performs work provides a benefit to agents within the new overtime program—a benefit which has a monetary value, as discussed in the above paragraph responding to criticisms that the overtime supplement effectively provides straight rate compensation.

Our regulations treat usage of compensatory time off in the same manner they treat annual leave or other paid time off. If an agent with a Level 1 tour has a full day (8 hours) of annual leave, the obligation to perform 2 hours of within-tour overtime does not accrue. We don't view this as giving the agent 10 hours of annual leave. Rather, we are just applying BPAPRA's rules regarding the overtime supplement and the associated hours obligations. Likewise, when an agent has 8 hours of holiday time off, we don't view the agent as receiving 10 hours of holiday time off merely because there are no obligated overtime hours on that day. The same logic applies to compensatory time off. We see no basis under the law for treating compensatory time off differently than other types of paid time off. (We understand CBP's

policy perspective that it is inappropriate to allow agents to work irregular overtime hours and earn compensatory time off and then to bundle those compensatory time off hours in a way that reduces within-tour overtime obligations. However, we believe a law change would be needed to achieve CBP's desired policy. For example, Congress could revise BPAPRA to specifically provide that the normal overtime obligation will accrue on any day when an agent uses any amount of compensatory time off.)

Under 5 U.S.C. 5550(b)(2)(A)(ii) and (3)(A)(ii), the within-tour overtime hours obligation accrues only if the employee "performs work" during regular time on that day. In our view, the term "work" cannot reasonably be interpreted to include use of compensatory time off which allows an employee to be excused from duty. In contrast, union "official time" under 5 U.S.C. 7131 involves specific activities that Congress has deemed to support Government objectives. While using official time, an employee is in a special duty status and is accountable for the time, not excused from all duty. Thus, official time has always been treated as work time for various purposes, including the application of overtime thresholds.

We do not interpret 5 U.S.C. 5542(g)(5)(C) as meaning that compensatory time off is not paid time off. That provision states: "[the agent] shall be required to use 1 hour of compensatory time off for each hour of regular time not worked for which the border patrol agent is not on paid leave or other paid time off." CBP believes that the word "other" implies that compensatory time off is not paid time off. We believe it is clear that this provision is simply stating that compensatory time off is used in place of time not worked when other paid time off is not being used.

We do not believe that 5 U.S.C. 5542(g)(5)(D) is in conflict with the proposed regulations. The language stating that an employee is not "entitled to any cash value" for

compensatory time off clearly refers to unused compensatory time off, since the use of compensatory time off generates basic pay. (See implementing regulation at § 550.1625(h).) Moreover, as explained above, the rule providing that an overtime obligation does not accrue when no work is performed during regular time is not an application of compensatory time off against an overtime hours debt. There is no overtime hours debt if the agent performs no work during regular time on the same day. Thus, while unused compensatory time off may be applied (not used) against an overtime hours debt, there is no such application in the absence of such a debt.

We do not view 5 U.S.C. 5542(g)(1)(B)(ii) and (g)(2)(B)(ii) as relevant. Those clauses provide that an agent receives compensatory time off for an equal amount of irregular overtime work. In other words, they deal with the earning of compensatory time off, not its usage. OPM regulation at § 550.1625(b) implements the hour-for-hour earning requirement. Section 5542(g)(5)(C) deals with usage and requires that 1 hour of compensatory time off be used for each hour of “regular time” not worked. That is exactly what OPM’s regulation at § 550.1625(g) provides, and the fact that an agent has no overtime obligation on a day when he or she uses compensatory time off during 8 hours of regular time is not inconsistent with that requirement. The removal of an overtime obligation by operation of 5 U.S.C. 5550(b)(2)(A)(ii) and (3)(A)(ii) is not the same as using compensatory time off. By definition, compensatory time off may be used only during regular time. (As explained above, compensatory time off may be applied against an overtime hours debt, but only if the debt exists.)

§ 550.1622 – Canine Handlers

Two individual commenters questioned whether Border Patrol agents would receive 1 hour of regularly scheduled overtime work for providing canine care on a scheduled day off under proposed § 550.1622(c).

Under both the law and proposed § 550.1622(c), Border Patrol agents do not receive additional pay beyond the 25 percent overtime supplement for canine care duties performed on a scheduled day off. BPAPRA expressly addresses how Border Patrol agents are compensated for canine care duties. BPAPRA states that any canine care provided by an agent, without regard to the actual duration or “whether such care occurs on the regular workday,” is counted as 1 hour of scheduled overtime within the agent’s regular tour of duty (5 U.S.C. 5550(b)(1)(F)(ii)). Thus, the canine care may actually be provided anytime, including on a non-workday. Regardless of the time or day the canine care is actually provided or how much time is actually spent providing canine care, an agent with canine care duties is automatically credited with 1 hour of scheduled overtime for canine care on each regular workday. Thus, these credited hours count toward the within-tour overtime obligation associated with a Level 1 tour and the corresponding 25 percent overtime supplement.

NBPC also commented on proposed § 550.1622(c). NBPC expressed concern that, if a Border Patrol agent is temporarily relieved of canine care duties, he or she could see a diminution in pay under proposed § 550.1622(c).

Based on NBPC’s comment, we are revising proposed § 550.1611(e) and proposed § 550.1612(d) to clarify how a change in an agent’s circumstances (in relation to § 550.1611(f) or § 550.1622) *during* the annual period affects the agent’s assigned tour. We are also adding a paragraph (2) to in § 550.1622(c) to further clarify what tour of duty applies to an agent who is

temporarily relieved of canine care duties. Under revised § 550.1611(e), we provide that an annual election superseded by operation of the superseding provisions of § 550.1611(f) or § 550.1622 remains the default election in the event there is a change in the circumstances that triggered application of those superseding provisions. Thus, while § 550.1611(f)(1) states that “an agent who is assigned canine care duties must be assigned a Level 1 regular tour of duty,” the agent’s annual election remains the default election made under § 550.1611(c) or (d) if § 550.1611(f)(1) ceases to be applicable during the annual period. In revised § 550.1612(d), we further clarify that CBP may change an agent’s tour of duty based on a change in circumstances, such as being temporarily relieved of canine care duties, during the annual period. The circumstances in §§ 550.1611(f) and 550.1622 could become applicable during the annual period or could cease to be applicable during the annual period. In either case, the affected agent’s assigned tour would be changed accordingly.

Further, we are adding a paragraph (2) to § 550.1622(c) to make clear that when an agent is temporarily relieved of canine care duties for more than 2 full pay periods, the agent’s tour of duty will automatically revert to his or her default election under § 550.1611(c) or (d). For example, consider a Border Patrol agent with canine care duties who had elected a Level 2 tour when making an annual election, but who now has a Level 1 tour based on application of § 550.1611(f)(1). If the agent is temporarily relieved of his or her canine care duties for more than 2 full pay periods during the annual period, the agent’s tour of duty will revert to default election (Level 2 tour of duty) made under § 550.1611(c) or (d). The agent will return to a Level 1 tour under § 550.1611(f)(1) when resuming canine care responsibilities. Further, paragraph (2) of § 550.1622(c) states that, when an agent is temporarily relieved of canine care duties for a time period shorter than 2 full pay periods, he or she may either remain at the Level 1 tour with a

25 percent overtime or temporarily return to his or her default election for the annual period under § 550.1611(c) or (d). Note that, if an agent remains at the Level 1 tour while temporarily relieved of canine care duties, he or she does not receive the 1 hour of regularly scheduled overtime canine care credit and must work 2 hours of regularly scheduled overtime for each day on which the agent performs work during regular time.

NBPC further commented that OPM should add clarifying language in § 550.1622(c) to make clear that canine handlers will always be assigned to a Level 1 tour regardless of pay assignment continuity.

We disagree. As stated previously concerning NBPC's comment on proposed § 550.1614(d), OPM's regulations rely on express language in the BPAPRA stating that, "notwithstanding any other provision of law," CBP "may take such action as is necessary" to implement the pay assignment continuity plan, including the unilateral assignment of agents to any of three tours (5 U.S.C. 5550(b)(1)(G)(ii)). Thus, in § 550.1611(f)(5), we provide that the pay assignment continuity provision will take precedence over tour assignments that would otherwise be made under paragraphs (f)(1)-(4) (where paragraph (f)(1) addresses canine handlers). The purpose of the pay assignment continuity provision is to protect the retirement fund. In order to provide that protection, an agent's tour assignments during his or her control period must be consistent with the agent's career average overtime supplement percentage. It would be detrimental to the retirement fund and to principles of equity if an agent could circumvent the career average consistency requirement by obtaining a canine handler position. Therefore, we are not revising proposed § 550.1622(c) or the related regulation at § 550.1611(f)(5).

§ 550.1625 – Irregular Overtime and Compensatory Time Off

Two individuals objected to the rules governing compensatory time off, including the biweekly 10-hour limit on earning compensatory time off and 26 pay period time limit on using compensatory time off.

The rules cited by the two individuals are statutory, and OPM has no authority to revise them by regulation. (See 5 U.S.C. 5542(g)(4) and (5).)

An individual commented that OPM regulations should require that compensatory time off be treated in the same manner as annual leave (i.e., a right vs. a privilege) to ensure that agents are allowed to use the compensatory time off they earn before expiration of the 26-pay-period time limit on using such time off.

The exact timing regarding when compensatory time off is used is subject to management approval. The same rule applies to annual leave. Just as OPM has not issued specific regulations regarding when an agency may deny an employee's request to use annual leave at a particular time, we are not issuing specific regulations regarding when a Border Patrol agent's request to use compensatory time off at a particular time may be denied. We expect CBP will issue supplemental guidance to address such matters.

NBPC commented that, for the purpose of applying the premium pay cap, compensatory time off should be assigned a value based on the agent's hourly rate of basic pay. NBPC stated this would be more consistent with Congressional intent than the approach in the proposed regulations.

In the proposed regulations at § 550.1625(d), we provided that, for the purpose of applying the premium pay cap under 5 U.S.C. 5547, Border Patrol compensatory time off hours would be assigned a dollar value based on the overtime pay that would have been payable if the

hours had been regularly scheduled outside the agent's tour. This is consistent with the treatment of compensatory time off earned under the title 5 provision (5 U.S.C. 5543) that applies to most Federal employees. The definition of "premium pay" in 5 CFR 550.103 states that it includes the dollar value of earned hours of compensatory time off, and that value is set in 5 CFR 550.114(g) as the amount of "overtime pay" the employee would have otherwise received. Thus, we have a long-established precedent for computing the value of compensatory time off at an overtime rate for the purpose of applying the premium pay cap. Congress reflected its knowledge of the existing OPM regulations when it specifically provided in BPAPRA that the value of Border Patrol compensatory time off must be counted in applying the premium pay cap (5 U.S.C. 5542(g)(5)(F); see also BPAPRA section 2(f)(3)). In exercising its broad regulatory authority under 5 U.S.C. 5548 and BPAPRA section 2(h), OPM has chosen to be consistent with its longstanding regulations and assign the value of Border Patrol compensatory time off based on an overtime rate. We decline to make the change recommended by NBPC.

§ 550.1626 – Absences during the Regular Tour of Duty

Two commenters asked how long an agent has to repay an overtime hours debt resulting from absences during obligated overtime hours.

Our regulations do not mandate a specific time limit for repaying an overtime hours debt. However, the law and the regulations require that any unused compensatory time off and future outside-tour overtime work must be automatically applied against the debt. Since CBP has authority to assign outside-tour overtime work, it has the ability to ensure that an employee's debt is being eliminated over a reasonable period of time. The absence of a regulatory time limit does not preclude CBP from establishing a time limit by agency policy, but the enforcement mechanism would be for CBP to order the agent to perform outside-tour overtime work. Under

the regulations, CBP does not have authority to require a monetary repayment until movement to a non-agent position or separation (including separation upon death). (See § 550.1626(d).)

An individual recommended revising § 550.1626(d) to allow an agent's positive balances of certain other types of paid time off (i.e., annual leave and sick leave, but not military leave) to be applied against an overtime hours debt at the end of each year. The individual stated that this would prevent an excessive amount of debt from accruing over the course of a career and being payable upon retirement.

As explained above, CBP has authority to assign outside-tour overtime work and thereby prevent an excessive debt of overtime hours. We are not inclined to take the step of requiring liquidation of the debt at the end of each year. This matter could be revisited after we have a chance to see how the program is working. However, we agree partially with the commenter's suggestion that an agent's positive balances of certain paid time off should be applied to offset any debt of overtime hours before converting the hours to a monetary debt. We are revising § 550.1626(d) to require that, at movement to a non-agent position or separation, any positive balance of annual leave, time-off awards, or compensatory time off for travel be applied to reduce the hours debt before it is converted to a monetary debt. We are including only types of accrued paid time off that can be used for any purpose. Thus, we did not include sick leave, military leave, or religious compensatory time off.

CBP commented that there should be a cap on the overtime hours debt such as 80 hours. CBP suggested that an agent who reached the debt limit would be automatically assigned a Basic tour based on a finding that the agent was unable to perform overtime on a daily basis (§ 550.1611(f)(2)).

We do not agree that a regulatory limit on the number of overtime debt hours should be established. As explained in our above responses to comments about the idea of time limits on eliminating an overtime hours debt, CBP has authority to assign outside-tour overtime work and thereby prevent an excessive debt of overtime hours. CBP also has authority to make a determination that an agent is unable to perform overtime on a daily basis, which would place the agent on a Basic tour with no within-tour overtime and prevent adding to an overtime hours debt going forward. Such a determination should be based on the agent's ability to work, not on a mathematical rule. CBP also has authority to disapprove an agent's request to be absent during obligated overtime hours and to take appropriate disciplinary action if an agent is absent without approval.

CBP commented that the regulations should not allow agents to receive compensation for hours substituted for periods of suspension or absence without leave approval (AWOL), since it would provide cash value for compensatory time off (earned by working irregular overtime hours). CBP cited 5 U.S.C. 5542(g)(5)(D), which provides that an agent "shall not be entitled to any cash value for compensatory time off earned under section 5550."

We do not agree with CBP's position. The substitution of outside-tour overtime hours is merely a device to implement overtime hours thresholds. In other words, substitution recognizes that, due to a period of nonpay status, an outside-tour hour cannot be treated as an overtime hour for pay purposes, since the hours are below the overtime threshold. Under 5 U.S.C. 5550(f), substitution of outside-tour overtime hours for "leave without pay" is required, and the term "leave without pay" includes all periods of nonpay status. (See definition in § 550.1603, which is consistent with OPM's longstanding application of the leave without pay substitution rule in 5 CFR 550.112(d), as necessary to ensure proper application of overtime thresholds.) The

substitution of an irregular overtime hour is done *before* creating compensatory time off hours. Section 5550(f)(1)(A)(ii) states that an hour substituted for a leave without pay hour “shall not be credited as overtime hours for any purpose.” Thus, an outside-tour overtime hour that would otherwise be an irregular overtime hour loses its character as an overtime hour for any purpose, including the provisions regarding the conversion of irregular overtime hours to compensatory time off hours. OPM’s regulation at § 550.1626(a) states that an hour substituted for leave without pay may not be considered to be an overtime hour for any purpose, and specifically cites § 550.1625, which is the section dealing with compensatory time off.

Thus, section 5542(g)(5)(D) is not violated by the substitution of what would otherwise be an irregular overtime hour for leave without pay. If used in substitution, the irregularly scheduled outside-tour hour is not treated as an overtime hour and cannot be converted to a compensatory time off hour. Since it is never a compensatory time off hour, there is no violation of the rule that no cash value be provided for a compensatory time off hour. (In any event, as we have explained above, OPM interprets section 5542(g)(5)(D) as barring cash payments for *unused* compensatory time off, since *use* of compensatory time off necessarily generates basic pay.)

We understand CBP’s concern to be that agents appear to be receiving compensation for suspension and AWOL through substitution of other hours of work. But, again substitution is merely a device to ensure that overtime thresholds are being applied and that overtime pay is not provided for hours below the overtime threshold. A suspension or AWOL hour (or any other type of leave without pay) is not actually generating any compensation. Compensation is generated by the hour that is being substituted for the nonpay status hour. The nonpay status still has the effect of reducing pay for the pay period.

If CBP's concern is that an employee who is suspended or placed in AWOL status may have an accrued balance of compensatory time off (based on irregular overtime hours worked in a previous pay period) and that such compensatory time off may be used during a period of suspension or AWOL, that concern is misplaced. There is no authority to use compensatory time off during a period of suspension or AWOL. The designation of a period of time as a period of suspension or AWOL precludes use of any other type of time off.

§ 550.1632 - Hazardous Duty Pay

One commenter requested that OPM specifically detail when an agent would be eligible to earn hazardous duty pay.

As provided in § 550.1632, agents are eligible for hazardous duty pay, subject to the requirements of 5 U.S.C. 5545(d) and subpart I of this part. An agent is eligible for hazardous duty pay if he or she meets the statutory and regulatory requirements as applicable to a specific set of circumstances. We are not amending proposed § 550.1632, since hazardous duty pay is addressed in subpart I.

§ 550.1633 – Treatment of Overtime Supplement as Basic Pay

NBPC commented that OPM should clarify that the Level 1 or Level 2 overtime supplement is considered “premium pay” for workers’ compensation purposes. NBPC noted the BPAPRA statute clearly addressed this.

We agree that the treatment of the overtime supplement for workers’ compensation purposes is addressed in law at 5 U.S.C. 5550(d), where the workers’ compensation provision in title 5 (section 8114(e)) is referenced. Section 5550(d) provides that the overtime supplement is “basic pay” (not premium pay) for purposes of applying the workers’ compensation law. OPM regulations address this in § 550.1633(c). No further clarification is needed.

§ 550.1635 - Alternative Work Schedules

NBPC provided comments in opposition to proposed § 550.1635 prohibiting Border Patrol agents from having a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II. NBPC commented that both BPAPRA and the committee report were silent in regards to whether an employee could work an alternative work schedule and do not expressly exclude it. NBPC stated that OPM should not bar the ability of the NBPC to negotiate for alternative work schedules on behalf of its members. NBPC conceded that while BPAPRA does say that agents working the three types of regular tours of duty “shall have a regular tour of duty consisting of 5 workdays per week,” it also states that nothing shall “be construed to limit the right of U.S. Customs and Border Protection to assign both scheduled and unscheduled work to a border patrol agent based on the needs of U.S. Customs and Border Protection.” NBPC suggests that by limiting agents to 8 hour daily tours, § 550.1635 would limit the right of CBP to schedule work as needed. NBPC states that recent legal interpretations of the word “shall” have also shown that an employer is not required to follow a certain provision, but instead has a choice of whether or not to do so. NBPC suggests that the term “shall” in BPAPRA should be read in a similar manner. NBPC further commented that BPAPRA does not rescind the title 5 provisions in subchapter II or chapter 61 that permits compressed work schedules.

Several individuals also provided comments in opposition to the proposed § 550.1635. Several individual commenters specifically mentioned CBP’s Overtime Transitional Plan which has allowed Border Patrol agents to work compressed work schedules. Other commenters stated that allowing agents to work a compressed work schedule would boost the morale of the agents. Several commenters suggested that a compressed work scheduled would allow better coverage of shifts by allowing supervisors to schedule all agents to work 10 hours. Both NBPC and several

commenters suggest OPM's regulations permit alternative work schedules, particularly a compressed work schedule.

We disagree with the commenters and are making no changes to proposed § 550.1635. We believe the clear language of BPAPRA does not allow a Border Patrol agent to have a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II. BPAPRA states that all Border Patrol agents "shall" have a regular tour of duty consisting of 5 workdays per week with an 8 hour regular tour of duty and either zero, one, or two hours of regularly scheduled overtime per day depending upon the employee election. We believe that word "shall" in BPAPRA is both clear and unambiguous. We also do not believe that § 550.1635 limits the ability of CBP to assign work. CBP may still assign Border Patrol agents to perform work as necessary, including additional irregular and regularly scheduled overtime hours. The flexibility to assign scheduled tours of duty linked to the overtime supplement is limited to the options provided under the law. Further, while CBP's Overtime Transitional Plan may have allowed Border Patrol agents to work compressed work schedules, the clear language of BPAPRA does not permit agents to work compressed work schedules. Similarly, any potential improvement in employee morale via alternative work schedules cannot overcome the clear language of BPAPRA barring their usage.

NBPC's comments cite a court case, *Abbey v. United States*, 745 F.3d 1363 (Fed. Cir. 2014), to support its position that the word "shall" can be interpreted to mean "may" (not necessarily required). As a general principle, the use of "shall" in statute means "must." The *Abbey* case involved a specific set of circumstances that are not applicable in interpreting BPAPRA. BPAPRA expressly provides that Border Patrol agents "shall" have one of three types of fixed regular tours of duty. BPAPRA links a specific rate of pay to a specific regular

tour of duty with fixed number of hours each regular workday as an absolute and mandatory requirement. Any flexibility CBP has with respect to regular tours of duty is in choosing which tour to assign to which employee, not in changing the nature of the tour itself.

We also note that the laws governing flexible and compressed work schedules include special rules related to overtime hours, compensatory time off, and night pay that are inconsistent with the BPAPRA rules, and Congress did not amend chapter 61 to address those inconsistencies, indicating that Congress did not intend for chapter 61 to be applicable. For example, section 6123(a)(1) provides that, for employees with a flexible work schedule, an agency head may grant compensatory time off for regularly scheduled overtime hours notwithstanding any other provision of law; however, section 5542(g) (as added by BPAPRA) provides that agents must be paid for regularly scheduled overtime and can receive compensatory time off only for irregular overtime hours.

§ 550.1636 - Exemption from Fair Labor Standards Act

Several commenters generally opposed Border Patrol agents being exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) under proposed § 550.1636. One individual stated that agents were being treated differently than other law enforcement officers and requested that agents be eligible for FLSA overtime pay. Another commenter suggested that exempting agents from the minimum wage and overtime provisions of the FLSA was contrary to labor laws of the United States. Another commenter stated the CBP officers receive better pay than Border Patrol agents and work shorter hours and questioned the fairness of Border Patrol agents being exempt under the FLSA. Several commenters requested that OPM's proposed regulations be amended to allow Border Patrol agents to remain eligible for the wage and overtime provisions of the FLSA.

We are not amending proposed § 550.1636. BPAPRA specifically provides that the minimum wage and overtime provisions of the FLSA are not applicable to Border Patrol agents.

§ 550.1637 – Travel Time

One individual provided a comment in opposition to an agent’s travel time not being considered hours of work and stated that agents, while traveling, continue to carry their firearm and are prepared to perform their law enforcement functions should the situation arise. The individual recommended that any travel time by an agent be considered hours of work.

We disagree. Certain travel time is considered hours of work under § 550.112(g). However, we do not agree that carrying a firearm and being prepared to perform law enforcement functions constitute the performance of actual work by an agent while traveling. We are not amending proposed § 550.1637.

§ 550.1638 – Official Time

NBPC commented that the requirement that agents serving as union representatives perform agency work during any period of regularly scheduled overtime is impractical and “makes little operational sense” because agents are normally deployed in the field “often more than an hour away from the station.” The union stated that it believes the regulations should be amended to make clear that scheduled overtime may be either official time or agency work in the field, or that the regulations should allow agents to work on average one day in the field per week to fulfill the overtime requirement.

We understand this comment to mean that, for example, an agent could request a weekly schedule consisting of four days with a 10-hour daily basic work requirement and a fifth day containing 10 within-tour overtime hours. However, such a schedule does not comply with any of the three schedules allowed under BPAPRA, since those schedules require an 8-hour basic

workday with a fixed amount of within-tour overtime each workday (one within-tour overtime hour under Level 2 or two within-tour overtime hours under Level 1). (See the section of this Supplementary Information addressing § 550.1635, which further addresses issues related to alternative work schedules.)

A schedule of the type requested by the NBPC comment cannot be accommodated in these regulations and, further, it is required that agency work be conducted during periods of overtime. Nevertheless, we acknowledge the unique operational environment at CBP and balance it with these constraints. In response to the NBPC comment on this topic, along with its comments on § 550.1603 (which are further addressed in the section of the Supplementary Information addressing § 550.1603), we have made some clarifying modifications to § 550.1638. The final regulation provides additional clarification regarding the specific circumstances under which agents may engage in representational work while in an obligated overtime status. In addition, the final regulation makes clear that when CBP determines an agent's official time duties during the basic workday make it impracticable to perform agency work during scheduled obligated overtime hours, and CBP excuses the agent from working those hours as a result, the agent will accrue an overtime hours debt. CBP would then provide the agent with an opportunity to eliminate the resulting overtime hours debt by performing agency work outside the agent's regular tour of duty at another time. In addition to this opportunity, we note that an agent may opt to eliminate an overtime hours debt by substituting available compensatory time off that the agent has earned in the past.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and E.O. 12866.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities because they will apply only to Federal agencies and employees.

List of Subjects

5 CFR Part 410

Education, Government employees.

5 CFR Part 550

Administrative practice and procedure, Claims, Government employees, Wages.

5 CFR Part 551

Government employees, Wages.

5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

For the reasons stated in the preamble, OPM is amending parts 410, 550, 551, and 870 of title 5 of the Code of Federal Regulations as follows:

PART 410—TRAINING

1. The authority citation for part 410 continues to read as follows:

Authority: 5 U.S.C. 1103(c), 2301, 2302, 4101, *et seq.*; E.O. 11348, 3 CFR, 1967 Comp., p. 275, E.O. 11478, 3 CFR 1966–1970 Comp., page 803, unless otherwise noted, E.O. 13087; and E.O. 13152.

Subpart D—Paying for Training Expenses

2. In § 410.402, add paragraph (b)(8) to read as follows:

§ 410.402 Paying premium pay.

* * * * *

(b) * * *

(8) *Border Patrol agent overtime supplement.* A Border Patrol agent may receive an overtime supplement under 5 U.S.C. 5550 and 5 CFR part 550, subpart P, during training, subject to the limitation in 5 U.S.C. 5550(b)(2)(G) and (b)(3)(G) and 5 CFR 550.1622(b).

* * * * *

PART 550—PAY ADMINISTRATION (GENERAL)

Subpart A—Premium Pay

3. The authority citation for subpart A of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5304 note, 5305 note, 5504(d), 5541(2)(iv), 5545a(h)(2)(B) and (i), 5547(b) and (c), 5548, and 6101(c); sections 407 and 2316, Pub. L. 105-277, 112 Stat. 2681-101 and 2681-828 (5 U.S.C. 5545a); section 2(h), Pub. L. 113-277, 128 Stat. 3005; E.O. 12748, 3 CFR, 1992 Comp., p. 316.

4. Amend § 550.103 by adding a sentence at the end of the definition of *premium pay* and adding in alphabetical order a definition of *regular tour of duty* to read as follows:

§ 550.103 Definitions.

* * * * *

Premium pay * * * This includes an overtime supplement received by a Border Patrol agent under 5 U.S.C. 5550 and subpart P of this part for regularly scheduled overtime hours within the agent’s regular tour of duty and the dollar value of hours of compensatory time off earned by such an agent.

* * * * *

Regular tour of duty, with respect to a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, means the basic 40-hour workweek plus any regularly scheduled overtime work hours that the agent is assigned to work as part of an officially established 5-day weekly work schedule generally consisting of—

(1) 10-hour workdays (including 2 overtime hours each workday) in exchange for a 25-percent overtime supplement (Level 1); or

(2) 9-hour workdays (including 1 overtime hour each workday) in exchange for a 12.5-percent overtime supplement (Level 2).

* * * * *

5. In § 550.107, remove “and” at the end of paragraph (a)(3), remove the period at the end of paragraph (a)(4) and add in its place “; and”, and add paragraph (a)(5).

The addition reads as follows:

§ 550.107 Premium payments capped on a biweekly basis when an annual limitation otherwise applies.

(a) * * *

(5) An overtime supplement for regularly scheduled overtime hours within a Border Patrol agent's regular tour of duty under 5 U.S.C. 5550.

* * * * *

6. In § 550.111, add paragraph (j) to read as follows:

§ 550.111 Authorization of overtime pay.

* * * * *

(j) For Border Patrol agents covered by 5 U.S.C. 5550 and subpart P of this part, overtime work means hours of work in excess of applicable thresholds, as specified in § 550.1623, excluding hours that are—

- (1) Compensated by payment of an overtime supplement for regularly scheduled overtime within the agent's regular tour of duty under § 550.1621;
- (2) Compensated by the earning of compensatory time off under § 550.1625; or
- (3) Used in substitution or application under § 550.1626.

7. In § 550.122, add paragraph (e) to read as follows:

§ 550.122 Computation of night pay differential.

* * * * *

(e) Border Patrol agents. For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no night pay differential is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the night pay differential for other hours that qualify for such a differential.

8. In § 550.132, add paragraph (d) to read as follows:

§ 550.132 Relation to overtime, night, and Sunday pay.

* * * * *

(d) For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no holiday premium pay is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the holiday premium pay for other hours that qualify for such premium pay.

9. In § 550.172, add the designation "(a)" at the beginning of the existing paragraph and add paragraph (b) to read as follows:

§ 550.172 Relation to overtime, night, and holiday pay.

* * * * *

(b) For a Border Patrol agent covered by 5 U.S.C. 5550 and subpart P of this part, no Sunday premium pay is payable for regularly scheduled overtime hours within the agent's regular tour of duty, as required by 5 U.S.C. 5550(b)(2)(C), (b)(3)(C), and (c)(1)(A). The overtime supplement payable for such scheduled overtime hours is not part of the agent's rate of basic pay used in computing the Sunday premium pay for other hours that qualify for such premium pay.

Subpart B—Advances in Pay

10. The authority citation for subpart B of part 550 is revised to read as follows:

Authority: 5 U.S.C. 5524a, 5527, 5545a(h)(2)(B), 5550(d)(1)(B); E.O. 12748, 3 CFR, 1992 comp., p. 316.

11. In § 550.202, amend the definition of *rate of basic pay* by removing “and” at the end of paragraph (3), removing the period at the end of paragraph (4) and adding in its place “; and”, and adding paragraph (5).

The additions reads as follows:

§ 550.202 Definitions.

* * * * *

Rate of basic pay * * *

(5) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550 (as allowed under 5 U.S.C. 5550(d)(1)(B)).

Subpart G—Severance Pay

12. The authority citation for subpart G of part 550 continues to read as follows:

Authority: 5 U.S.C. 5595; E.O. 11257, 3 CFR, 1964-1965 Comp., p. 357.

13. In § 550.703, amend the definition of *rate of basic pay* by removing “and” at the end of paragraph (3), removing the period at the end of paragraph (4) and adding in its place “; and”, and adding paragraph (5).

The addition reads as follows:

§ 550.703 Definitions.

* * * * *

Rate of basic pay * * *

(5) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550 (as required by 5 U.S.C. 5550(d)(1)(A)).

* * * * *

Subpart L—Lump-Sum Payment for Accumulated and Accrued Annual Leave

14. The authority citation for subpart L continues to read as follows:

Authority: 5 U.S.C. 5553, 6306, and 6311.

§ 550.1204 [Amended]

15. In § 550.1204, amend paragraph (a) by removing “compensatory time off earned under 5 U.S.C. 5543 and § 550.114(d) or § 551.531(d) of this chapter” and adding in its place “unused compensatory time off earned under 5 U.S.C. 5543 and § 550.114(d) or § 551.531(d) or under 5 U.S.C. 5542(g) and § 550.1625”.

16. In § 550.1205, remove “; and” at the end of paragraph (b)(5)(ii) and add a period in its place and add paragraph (b)(5)(iv).

The addition reads as follows:

§ 550.1205 Calculating a lump-sum payment.

* * * * *

(b) * * *

(5) * * *

(iv) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550, as in effect immediately prior to the date the agent became eligible for a lump-sum payment under § 550.1203. The agency must base the lump-sum payment on the agent’s assigned overtime supplement percentage. The assigned percentage will be considered fixed for the duration of the lump-sum annual leave projection period described in § 550.1204, even if an annual period for elections under 5 U.S.C. 5550 begins during that projection period. In cases where the amount of the overtime supplement actually payable in a pay period was limited by a statutory cap, the agency must base the lump-

sum payment on a reduced percentage rate that reflects the actual amount of the overtime supplement the agent could receive in a pay period.

* * * * *

17. Add subpart P to read as follows:

Subpart P—Overtime Pay for Border Patrol Agents

Sec.

General Provisions

- 550.1601 Purpose and authority.
- 550.1602 Coverage.
- 550.1603 Definitions.
- 550.1604 Authority of U.S. Customs and Border Protection.
- 550.1605 Interpretation instruction.

Assignment of Regular Tour of Duty and Overtime Supplement

- 550.1611 Assignments for an annual period.
- 550.1612 Assignments made at other times.
- 550.1613 Selection of agents for assignment.
- 550.1614 Limit on percentage of agents who do not have a Level 1 regular tour of duty.
- 550.1615 Pay assignment continuity.
- 550.1616 Corrective actions.

Treatment of Overtime Work

- 550.1621 Rules for types of regular tour of duty.
- 550.1622 Circumstances requiring special treatment.
- 550.1623 Overtime work outside the regular tour of duty.
- 550.1624 Regularly scheduled overtime outside the regular tour of duty.
- 550.1625 Irregular overtime and compensatory time off.
- 550.1626 Leave without pay during regular time and absences during obligated overtime hours.

Relationship to Other Provisions

- 550.1631 Other types of premium pay.
- 550.1632 Hazardous duty pay.
- 550.1633 Treatment of overtime supplement as basic pay.
- 550.1634 Leave and other paid time off.
- 550.1635 Alternative work schedule.

- 550.1636 Exemption from Fair Labor Standards Act.
- 550.1637 Travel time.
- 550.1638 Official time.

Subpart P—Overtime Pay for Border Patrol Agents

Authority: 5 U.S.C. 5548 and 5550(b)(1)(B) and (d)(1)(B); section 2(h), Pub. L. 113-277, 128 Stat. 3005.

General Provisions

§ 550.1601 Purpose and authority.

This subpart contains OPM regulations to implement section 2 of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), which added section 5550 in title 5, United States Code, and made related statutory amendments. The Act created a special overtime pay program for Border Patrol agents in the U.S. Customs and Border Protection component within the Department of Homeland Security. OPM has authority under 5 U.S.C. 5548(a) to regulate subchapter V (Premium Pay) of chapter 55 of title 5, United States Code, including section 5550 and the Act's amendments to sections 5542 and 5547. OPM was also granted broad authority to promulgate necessary regulations to carry out the Act and the amendments made by the Act under section 2(h) of the Act.

§ 550.1602 Coverage.

This subpart applies to an employee of the U.S. Customs and Border Protection component of the Department of Homeland Security (or any successor organization) who holds a position assigned to the Border Patrol Enforcement classification series 1896 or any successor series, consistent with classification standards established by OPM. Such an employee is referred to as a "Border Patrol agent" or "agent" in this subpart.

§ 550.1603 Definitions.

For the purpose of this subpart—

Advanced training means all training, other than initial training, provided on a whole-workday basis. Advanced training excludes training that covers only part of an 8-hour basic workday.

Agent means a Border Patrol agent.

Annual period means a 1-year period that begins on the first day of the first pay period beginning on or after January 1 of a given year and ends on the day before the first day of the first pay period beginning on or after January 1 of the next year. The term “year” in 5 U.S.C. 5550(b)(1)(A) and (C) and the term “leave year” in 5 U.S.C. 5542(g)(5)(A) are interpreted to be an annual period as defined here.

Basic regular tour of duty means an officially established weekly regular tour of duty consisting of five 8-hour workdays (including no overtime hours) for which no overtime supplement is payable.

Basic workday means the 8 nonovertime hours on a day within an agent’s basic workweek.

Basic workweek, for full-time employees, means the 40-hour workweek established in accordance with 5 CFR 610.111.

Border Patrol agent means an employee to whom this subpart applies, as provided in § 550.1602.

CBP means the component of the Department of Homeland Security known as U.S. Customs and Border Protection (or any successor organization). When this term is used in the context of CBP making determinations or taking actions, it means management officials of CBP who are authorized to make the given determination or take the given action.

Hybrid pay period means a biweekly pay period within which—

(1) An agent has one type of established regular tour of duty for one part of the pay period and another type of regular tour of duty for a different part of the pay period; or

(2) An individual is employed as an agent for only a portion of the pay period.

Initial training means training for newly hired agents—including initial orientation sessions, basic training, and other preparatory activities—provided prior to the agent’s first regular work assignment in which he or she will be authorized to make arrests and carry a firearm.

Irregular overtime work means officially ordered or approved overtime work that is not regularly scheduled overtime work—i.e., overtime work that is not part of the agent’s regularly scheduled administrative workweek.

Leave without pay means a period of time within an agent’s basic workweek during which the agent is in nonpay status, including periods of unpaid voluntary absence with approval, absence without approval (AWOL), suspension, or furlough.

Level 1 regular tour of duty means an officially established weekly regular tour of duty generally consisting of five 10-hour workdays (including 2 overtime hours each workday) that provides entitlement to a 25 percent overtime supplement.

Level 2 regular tour of duty means an officially established weekly regular tour of duty generally consisting of five 9-hour workdays (including 1 overtime hour each workday) that provides entitlement to a 12.5 percent overtime supplement.

Obligated overtime hours means regularly scheduled overtime hours that an agent with a Level 1 or Level 2 regular tour of duty is obligated to work as part of the agent’s regular tour of

duty, if the agent performs any amount of work during regular time on same day, and that are converted into an overtime hours debt when the agent fails to work the hours.

Overtime hours debt means the balance of obligated overtime hours not worked for which the agent has not satisfied the hours obligation by applying compensatory time off hours or other overtime hours of work outside the agent's regular tour of duty.

Overtime supplement means a payment received (in addition to the regular amount of basic pay for nonovertime work) in exchange for regularly scheduled overtime work within an agent's Level 1 or Level 2 regular tour of duty. For an agent who is assigned a 10-hour workday as part of the agent's Level 1 regular tour of duty, the overtime supplement is 25 percent. For an agent who is assigned a 9-hour workday as part of the agent's Level 2 regular tour of duty, the overtime supplement is 12.5 percent. The overtime supplement is computed as provided in § 550.1621(a)(4) and (b)(4). For an agent with a Basic regular tour of duty, the overtime supplement is 0 percent.

Pay period means a 14-day biweekly pay period.

Rate of basic pay means the regular nonovertime rate of pay payable to an agent, excluding any overtime supplement, but including any applicable locality payment under 5 CFR part 531, subpart F; special rate supplement under 5 CFR part 530, subpart C; or similar payment or supplement under other legal authority, before any deductions and exclusive of additional pay of any other kind. An overtime supplement is included as part of an agent's rate of basic pay for purposes outside this subpart, as provided in § 550.1633.

Regularly scheduled administrative workweek, for a full-time employee, means the period within an administrative workweek, established in accordance with 5 CFR 610.111, within which the employee is regularly scheduled to work.

Regularly scheduled work means work (including overtime work) that is scheduled in advance of an administrative workweek under an agency's procedures for establishing workweeks in accordance with 5 CFR 610.111.

Regular time means the regular basic (nonovertime) hours within an agent's 8-hour basic workday within the 40-hour basic workweek.

Regular tour of duty means the basic 40-hour workweek plus any regularly scheduled overtime work hours that the agent is assigned to work as part of an officially established 5-day weekly work schedule generally consisting of—

(1) 10-hour workdays (including 2 overtime hours each workday) in exchange for a 25 percent overtime supplement (Level 1); or

(2) 9-hour workdays (including 1 overtime hour each workday) in exchange for a 12.5 percent overtime supplement (Level 2).

§ 550.1604 Authority of U.S. Customs and Border Protection.

Authorized management officials of U.S. Customs and Border Protection are responsible for determining the mission requirements and operational needs of the organization and have the right to assign scheduled and unscheduled work as necessary to meet those requirements and needs, regardless of an agent's officially established regular tour of duty. (See subsections (a) and (f)(1) of section 2 of Public Law 113-277 and 5 U.S.C. 5550(g).)

§ 550.1605 Interpretation instruction.

As required by section 2(f) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), nothing in section 2 of the Act or this subpart may be construed to require compensation of an agent other than for hours during which the agent is actually performing

work or using approved paid leave or other paid time off. This section does not prevent CBP from granting paid excused absence from an agent's basic workweek under other authority.

Assignment of Regular Tour of Duty and Overtime Supplement

§ 550.1611 Assignments for an annual period.

(a) *Annual period.* The assignment of a regular tour of duty and overtime supplement to an agent is in effect for a full annual period (or the portion of such period during which the individual is employed as an agent), except as otherwise provided in this subpart. The annual period is a 1-year period that begins on the first day of the first pay period beginning on or after January 1 of a given year and ends on the day before the first day of the first pay period beginning on or after January 1 of the next year.

(b) *Information regarding annual election opportunity.* No later than November 1 of each year, CBP must provide each currently employed agent with information regarding the opportunity to elect a regular tour of duty and corresponding overtime supplement for the next annual period. The information must include an explanation of election options and procedures. For an agent who will be in initial training status on the first day of the annual period, this paragraph is not applicable, and § 550.1612(a) and (b) will apply instead.

(c) *Annual election opportunity.* No later than December 1 of each year, an agent to whom paragraph (b) of this section is applicable may make an election among three options for the regular tour of duty and corresponding overtime supplement (as described in § 550.1621) that the agent wishes to be applicable to him or her during the next annual period.

(d) *Failure to make an election.* If an agent fails to make a timely election under paragraph (c) of this section, CBP must assign the agent a Level 1 regular tour of duty for the

annual period (i.e., deemed election) with a 25 percent overtime supplement, except as otherwise provided in paragraph (f) of this section or § 550.1622.

(e) Effect of agent election. CBP must assign an agent the regular tour of duty elected by the agent under paragraph (c) or (d) of this section unless CBP informs the agent of an alternative assignment, as provided under paragraph (f) of this section or § 550.1622. CBP may change the assignment during the annual period, as provided under § 550.1612(d). An annual election under paragraph (c) or (d) of this section that is superseded as provided under paragraph (f) of this section or § 550.1622 remains as the default election in the event that the superseding circumstances cease to be applicable, subject to § 550.1612(d).

(f) Management assignment to tour. CBP may assign a different regular tour of duty than that elected by the agent under paragraph (c) or (d) of this section for an upcoming annual period under the following circumstances:

(1) An agent who is assigned canine care duties must be assigned a Level 1 regular tour of duty, subject to § 550.1622(c);

(2) An agent who is unable to perform overtime on a daily basis, as determined by CBP, must be assigned a Basic regular tour of duty with no overtime supplement until such time as CBP determines the agent is able to perform the required overtime on a daily basis, subject to the rules in § 550.1612(e);

(3) An agent who holds a position at CBP headquarters, as a training instructor at a CBP training facility, or as a fitness instructor—or who holds another type of position that CBP has determined to be an administrative position— must be assigned a Basic regular tour of duty unless CBP determines a Level 1 or Level 2 regular tour of duty may be assigned to the agent

based on a comprehensive staffing analysis conducted for the agent's duty station as required by section 2(e) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277);

(4) CBP determines that an agent must be assigned to a Level 1 regular tour of duty to ensure that not more than 10 percent (or higher percentage established under § 550.1614(b)) of agents stationed at a location are assigned to a Level 2 regular tour of duty or a Basic regular tour of duty, as required by 5 U.S.C. 5550(b)(1)(E) and § 550.1614; or

(5) CBP determines that assignment of a different regular tour of duty is necessary to comply with the pay assignment continuity provisions in 5 U.S.C. 5550(b)(1)(G) and § 550.1615, notwithstanding any other provision of law or this subpart (including paragraphs (f)(1) through (4) of this section).

(g) *Temporary detail.* If an agent is serving in a position under a temporary detail, that position may not be considered, for the purpose of applying paragraph (f)(3) of this section, to be the position held by the agent during the first 90 days of the detail. After completing 90 days under a temporary detail, an agent will be considered, for the purpose of applying paragraph (f)(3) of this section, to hold the position to which temporarily detailed for the remainder of the detail, notwithstanding the agent's official position of record.

§ 550.1612 Assignments made at other times.

(a) *Initial training period.* An individual who is newly hired as an agent must be assigned a Basic regular tour of duty during any period of initial training. After completing any period of initial training, an agent must be assigned a Level 1 regular tour of duty for any portion of the annual period remaining at that point, except under applicable circumstances described in paragraph (f) of § 550.1611 or paragraph (b) of this section.

(b) Election by new agent. An agent who would otherwise be assigned a regular tour of duty under paragraph (a) of this section may submit an election of a different regular tour of duty to be effective on a prospective basis for the remaining portion of the annual period. CBP must provide the agent with election information no later than the date the agent begins a regular work assignment (i.e., after completing any period of initial training). CBP must assign an agent the regular tour of duty elected by the agent under this section unless CBP informs the agent of an alternative assignment based on the circumstances described in paragraph (f) of § 550.1611. Such election must be submitted to CBP no later than 30 days after the agent begins a regular work assignment and, if approved by CBP, is effective on the first day of the first pay period beginning on or after the later of—

- (1) The date the election was submitted; or
- (2) The date the agent completed initial training.

(c) Belated election for new agent's first annual period. An individual who is newly hired as an agent during the period beginning on November 2 and ending on the day before the first day of the next annual period may make an election to take effect at the beginning of the next annual period notwithstanding the normally applicable December 1 election deadline, if the agent will not be in initial training status on the first day of the annual period. Such election must be submitted no later than 30 days after receiving election information, but before the first day of the annual period. Such an election is subject to the same requirements and conditions that apply to an election for an annual period under paragraphs (e) and (f) of § 550.1611. If such election is not made, CBP must assign the agent a Level 1 regular tour of duty with a 25 percent overtime supplement for the next annual period, except under applicable circumstances described in paragraph (f) of § 550.1611.

(d) Change in tour during annual period. CBP may change an agent's assigned regular tour of duty during an annual period based on a change in the circumstances described in § 550.1611(f) or in § 550.1622. For example, an agent's regular tour of duty may be changed one or more times during an annual period as necessary to comply with the pay assignment continuity provision described in § 550.1611(f)(5). As provided in § 550.1611(e), an annual election under § 550.1611(c) or (d) that is superseded by operation of § 550.1611(f) or § 550.1622 remains as the default election and becomes effective in the event that § 550.1611(f) or § 550.1622 ceases to be applicable. A tour change under this paragraph is effective with the change in circumstances, as determined by CBP, except as otherwise provided in paragraph (e)(2) of this section and § 550.1622(c)(2).

(e) Inability determination and effective date of tour change. The action to assign a Basic regular tour of duty based on a determination that an agent is unable to perform overtime on a daily basis under § 550.1611(f)(2) is subject to the following rules:

(1) The inability determination may be made—

(i) When an agent's law enforcement authority is revoked (e.g., in connection with an investigation, loss of security clearance, or a suspension);

(ii) When an agent is unable to perform overtime duties for an extended period due to physical or health reasons; or

(iii) For any other appropriate reason, as determined by CBP, but excluding inability based on lack of work (as opposed to inability based on the employee's availability).

(2) The change to a Basic regular tour of duty is effective on the next workday following a CBP inability determination, except that—

(i) CBP may delay the effective date to coincide with the beginning of a week or a biweekly pay period;

(ii) CBP may delay the effective date as necessary to allow an agent who is able to work during regular time to exhaust a positive balance of unused compensatory time off (by applying that balance against the newly accruing overtime hours debt resulting from work during regular time);

(iii) CBP may delay the effective date as necessary to allow an agent to use accrued paid leave or other paid time off if the agent will be performing no work during regular time for a continuous period;

(iv) CBP may delay the effective date during a continuous period of leave without pay granted under 5 U.S.C. chapter 63, subchapter V (dealing with family and medical leave); and

(v) CBP must delay the effective date during any period of paid leave, continuation of pay, or leave without pay granted in connection with application of 5 U.S.C. chapter 81 (dealing with workers' compensation due to a job-related injury).

§ 550.1613 Selection of agents for assignment.

If application of paragraphs (f)(3) and (4) of § 550.1611 (or application of those paragraphs through § 550.1612) requires CBP to select agents for assignment to a particular regular tour of duty out of a pool of agents who prefer a different assignment, CBP must make any such selection consistent with an established written plan that includes the criteria that will be considered and the priority of those criteria. Such plan must be consistent with the requirements of this subpart.

§ 550.1614 Limit on percentage of agents who do not have a Level 1 regular tour of duty.

(a) CBP must take such action as is necessary, including unilateral assignment of agents to a Level 1 regular tour of duty, to ensure that not more than 10 percent of agents stationed at a location are assigned to a Level 2 regular tour of duty or a Basic regular tour of duty, as required by 5 U.S.C. 5550(b)(1)(E), notwithstanding any other provision of law or this subpart, except as provided by paragraphs (b), (c), and (d) of this section. For the purpose of this paragraph, the term “location” means a Border Patrol sector, which includes all subordinate organizational structures and related geographic areas within the sector (e.g., stations).

(b) CBP may waive the 10 percent limit in paragraph (a) of this section and apply a higher percentage limit if CBP determines it is able to adequately fulfill its operational requirements under that higher limit based on a comprehensive staffing analysis conducted for the agent’s duty station under section 2(e) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277).

(c) The 10 percent limit in paragraph (a) does not apply to agents working at CBP headquarters or at a CBP training location.

(d) Regardless of the percentage limits set under this section, assignments of regular tours of duty to individual agents must be made consistent with the requirement to ensure pay assignment continuity under § 550.1615.

§ 550.1615 Pay assignment continuity.

(a) *Plan.* (1) In consultation with OPM, CBP must develop and implement a plan to ensure, to the greatest extent practicable, that the assignment of a regular tour of duty to an agent during all consecutive 3-year periods within the control period specified in paragraph (b) of this section produces an average overtime supplement percentage (during each 3-year period) that is

consistent with the agent's average overtime supplement percentage during the course of the agent's career prior to the beginning of that control period, subject to paragraph (c) of this section. The purpose of this plan is to protect the retirement fund and ensure that agents are not able to artificially enhance their retirement annuities during the period when the high-3 average pay may be determined (in accordance with 5 U.S.C. 8331(4) or 5 U.S.C. 8401(3)).

(2) In applying paragraph (a)(1) of this section, the career average overtime supplement percentage for an agent is the greater of—

(i) The average of overtime supplement percentages (25 percent, 12.5 percent, or 0 percent) assigned during service as an agent on or after January 10, 2016, that is prior to the beginning of the agent's control period (as specified in paragraph (b) of this section); or

(ii) The average of the overtime supplement percentages during all service as an agent that is prior to the beginning of the agent's control period (as specified in paragraph (b) of this section), with assigned overtime supplement percentages (25, 12.5, or 0 percent) assigned during service on or after January 10, 2016, and with assigned percentages of administratively uncontrollable overtime under 5 U.S.C. 5545(c)(2) treated as overtime supplement percentages for any period of service prior to January 10, 2016.

(3) In applying paragraph (a)(2) of this section, the assigned overtime supplement percentage is used regardless of whether or not the payable amount of the overtime supplement is limited by a premium pay cap.

(4) In applying paragraph (a)(2) of this section, if an agent's control period begins on January 10, 2016, as provided in paragraph (b), the agent's initially assigned overtime supplement percentage must be considered the agent's career average under paragraph (a)(2)(i).

(b) Control period. The period of time during which CBP must control an agent's assignment to a regular tour of duty (i.e., the control period) begins on the date 3 years before the agent meets age and service requirements for an immediate retirement and remains in effect during all subsequent service in a Border Patrol agent position. If, as of January 10, 2016, the date that is 3 years before the agent first met age and service requirements for an immediate retirement has already passed, then the agent's control period is considered to have begun on January 10, 2016.

(c) Consistency requirement. (1) The consistency requirement in paragraph (a) of this section is considered to be met when the agent's average overtime supplement percentage during all consecutive 3-year periods within the control period specified in paragraph (b) of this section is within 2.5 percentage points of the agent's average overtime supplement percentage during the course of the agent's career prior to the beginning of that control period, except as provided in paragraph (c)(2) of this section.

(2) Notwithstanding the consistency requirement in paragraph (a) of this section, the CBP plan may allow an agent to be assigned a regular tour of duty that provides an overtime supplement percentage that is less than that necessary to produce an average percentage (during all consecutive 3-year periods within the control period specified in paragraph (b)) that is consistent with the agent's career average percentage if—

(i) The agent's overtime supplement is limited by the premium pay cap under §§ 550.105 and 550.107 and the agent voluntarily elects a regular tour of duty providing such a lesser overtime supplement percentage that is approved by CBP; or

(ii) CBP determines an agent is unable to perform overtime on a daily basis due to a physical or medical condition affecting the agent and assigns the agent a Basic regular tour of

duty, as described in § 550.1611(f)(2), (but only if such assignment makes it impossible to satisfy the consistency requirement during any given consecutive 3-year period).

(d) CBP authority. (1) CBP may take such action as is necessary, including the unilateral assignment of a regular tour of duty to implement the plan described in paragraph (a) of this section, notwithstanding any other provision of law or this subpart, except as provided in paragraph (d)(2) of this section.

(2) Notwithstanding the requirements of 5 U.S.C. 5550(b)(1)(G) and this section, CBP is authorized to assign agents to regular tours of duty as necessary to meet operational requirements. Before exercising the authority to allow assignment of a regular tour of duty that does not comply with the plan described in paragraph (a) of this section, CBP must first determine that it cannot adequately address the specific operational requirements in question by other means, such as the assignment of overtime work outside the regular tour of duty to the affected agent or other agents. If this authority is exercised, CBP must return an affected agent to a regular tour of duty that complies with the plan described in paragraph (a) of this section as soon as possible.

(e) Reporting requirements—(1) Annual data reporting for agents within their control period. For each agent within the control period specified in paragraph (b) of this section, CBP must provide to OPM no later than March 30th of each year the following information (in a format specified by OPM) based on data compiled through the end of the most recent annual period:

(i) The date the agent became subject to controls on the assignment to a regular tour of duty;

(ii) The date the agent will become subject to mandatory separation under 5 U.S.C. 8335(b) or 5 U.S.C. 8425(b);

(iii) The service computation date based on eligibility under 5 U.S.C. 8336(c) or 5 U.S.C. 8412(d);

(iv) The average overtime supplement percentage during the course of the agent's career prior to the beginning of the control period specified in paragraph (b);

(v) The average overtime supplement percentage for the time period beginning with the date the agent became subject to controls on the assignment to a regular tour of duty and ending on the last day of the most recent annual period;

(vi) The average overtime supplement percentage for the last three annual periods (excluding any time that was not within a control period specified in paragraph (b) of this section);

(vii) The average overtime supplement percentage for the most recent annual period (excluding any time that was not within a control period specified in paragraph (b) of this section), and;

(viii) Any other information requested by OPM.

(2) Annual data reporting for all agents. No later than March 30th of each year, CBP must provide to OPM the following information (in a format specified by OPM) for each agent compiled for the preceding calendar year based on salary payments made during that year:

(i) The amount of earnings subject to retirement deductions, including overtime supplement payments, received during the most recent calendar year;

(ii) The amount of earnings subject to retirement deductions during the most recent calendar year minus the total amount of the overtime supplement payments during that year;

(iii) The service computation date computed as though law enforcement officer service is regular employee service (i.e., the “regular” SCD);

(iv) The service computation date computed with credit for law enforcement officer service, and any other service creditable for eligibility under 5 U.S.C. 8336(c) or 5 U.S.C. 8412(d) (i.e., the “LEO” SCD);

(v) Date of birth;

(vi) Gender;

(vii) Retirement system (e.g., CSRS, FERS, FERS-RAE, FERS-FRAE); and

(viii) Any other information requested by OPM.

(3) Additional data. CBP must provide additional data as requested by OPM at any time, including data on the percentage rate of administratively uncontrollable overtime under § 550.154 during the period before the annual period that begins in January 2016.

(f) Corrective actions. If it is determined that the consistency requirement described in paragraphs (a) and (c) of this section is not being met for a particular agent, CBP must document why the differential occurred and establish any necessary actions, including the modification of the plan described in paragraph (a) of this section, to ensure that the goal of pay assignment continuity is achieved going forward. Consistent with § 550.1616(b), CBP is not required to retroactively correct an agent’s assigned tour or overtime supplement based on violation of the consistency requirement, except when CBP determines there exists, in connection with an agent’s assigned overtime supplement, evidence of fraud, misrepresentation, fault, or lack of good faith on the part of that agent.

§ 550.1616 Corrective actions.

(a) Except as provided in paragraph (b) of this section, an error made in connection with the assignment of an agent's regular tour of duty (including any associated overtime supplement) must be corrected as soon as possible.

(b) A retroactive correction of a tour assignment (i.e., actual assigned work schedule as opposed to an error in the payroll system) may not be made in the following circumstances, unless CBP determines there exists, in connection with an agent's assigned tour, evidence of fraud, misrepresentation, fault, or lack of good faith on the part of the affected agent:

(1) Correction of an error in applying the consistency requirement described in §§ 550.1611(f)(5) and 550.1615; and

(2) Correction of an error that caused an employee to have a Level 1 regular tour of duty based solely on misapplication of the applicable percentage limitation described in §§ 550.1611(f)(4) and 550.1614.

Treatment of Overtime Work

§ 550.1621 Rules for types of regular tour of duty.

(a) *Level 1 regular tour of duty.* For an agent with a Level 1 regular tour of duty and a 25 percent overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 10-hour workdays (an 8-hour basic workday and 2 regularly scheduled overtime hours);

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) The obligation to perform 2 hours of overtime work on a day including part of the agent's regular tour of duty does not apply if the agent performs no work during regular time on that day, subject to paragraph (e) of this section;

(4) As compensation for regularly scheduled overtime hours within the regular tour of duty, the agent is entitled to an overtime supplement equal to 25 percent of the agent's hourly rate of basic pay times the number of paid hours of regular time for the agent in the pay period (subject to the premium cap in §§ 550.105 and 550.107 and the restriction in § 550.1626(a)(5)), and no additional compensation or compensatory time off may be provided for such overtime hours;

(5) For any additional regularly scheduled overtime hours outside the regular tour of duty, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(6) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626;

(7) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a); and

(8) If the agent is absent during regularly scheduled overtime hours within the agent's regular tour of duty that the agent is obligated to work, the agent accrues an obligation to perform other overtime work for each hour (or part thereof) the agent is absent, and such obligation must be satisfied as provided in § 550.1626.

(b) Level 2 regular tour of duty. For an agent with a Level 2 regular tour of duty and a 12.5 percent overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 9-hour workdays (an 8-hour basic workday and 1 regularly scheduled overtime hour);

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) The obligation to perform 1 hour of overtime work on a day including part of the agent's regular tour of duty does not apply if the agent performs no work during regular time on that day, subject to paragraph (e) of this section;

(4) As compensation for regularly scheduled overtime hours within the regular tour of duty, the agent receives an overtime supplement equal to 12.5 percent of the agent's hourly rate of basic pay times the number of paid hours of regular time for the agent in the pay period (subject to the premium cap in §§ 550.105 and 550.107 and the restriction in § 550.1626(a)(5)), and no additional compensation or compensatory time off may be provided for such overtime hours;

(5) For any additional regularly scheduled overtime hours outside the regular tour of duty, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(6) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626;

(7) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is

absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a); and

(8) If the agent is absent during regularly scheduled overtime hours within the agent's regular tour of duty that the agent is obligated to work, the agent accrues an obligation to perform other overtime work for each hour (or part thereof) the agent is absent, and such obligation must be satisfied as provided in § 550.1626.

(c) Basic regular tour of duty. For an agent with a Basic regular tour of duty that includes no scheduled overtime hours and provides no overtime supplement, the following rules apply:

(1) The agent has an officially established weekly regular tour of duty generally consisting of five 8-hour basic workdays;

(2) The agent's 8-hour basic workday (regular time) may be interrupted by an unpaid off-duty meal break;

(3) For any regularly scheduled overtime hours, the agent is entitled to overtime pay as provided in § 550.1624, except as otherwise provided by § 550.1626;

(4) For any irregular overtime hours, the agent is entitled to be credited with compensatory time off as provided in § 550.1625, except as otherwise provided by § 550.1626; and

(5) The agent must be charged corresponding amounts of paid leave, compensatory time off, other paid time off, or time in nonpay status for each hour (or part thereof) the agent is absent from duty during regular time, as provided in § 550.1634, except as otherwise provided in § 550.1626(a).

(d) Effect of premium pay cap. If a premium pay cap established under 5 U.S.C. 5547 and §§ 550.105 and 550.107 limits payment of an overtime supplement or regularly scheduled overtime pay, or limits crediting of compensatory time off, the affected agent is still required to perform assigned overtime work.

(e) Meaning of “work”. In applying paragraphs (a)(3) and (b)(3) of this section, the term “work” refers to paid hours of work, consistent with § 550.112, except that paid leave and other paid time off when an agent is excused from duty are not considered to be work hours. Official time under 5 U.S.C. 7131 during regular time is considered to be paid hours of “work” during the time an employee otherwise would be in a duty status.

(f) Approval of absences. Any absence during obligated overtime hours (as described in paragraphs (a)(8) and (b)(8) of this section) is subject to management approval under CBP policies.

§ 550.1622 Circumstances requiring special treatment.

(a) General. The rules in paragraphs (b) and (c) of this section provide for special treatment based on specified circumstances and apply notwithstanding any other provision of this subpart.

(b) Advanced training. (1) During the first 60 days of advanced training in a calendar year, an agent’s assigned regular tour of duty must be considered to continue and the agent must be deemed to have worked during any nonwork period within obligated overtime hours for the purpose of determining the agent’s total hours to be compared to the applicable overtime threshold (as provided in § 550.1623(a)(2)(iv)), except as provided under paragraph (b)(2) of this section.

(2) If an agent, during the period covered by paragraph (b)(1) of this section, performs creditable overtime work outside the agent's regular tour of duty on a day when the agent performed less than the required amount of obligated overtime work, the overtime work outside the regular tour of duty must be applied towards the obligated overtime hours, as provided in § 550.1626(b). After any such substitution, CBP must credit the agent with hours of work for any remaining nonwork time during obligated overtime hours on the same day for the purpose of determining the agent's total hours to be compared to the applicable overtime threshold. For example, if an agent performs 2 creditable hours of regularly scheduled overtime work outside the agent's Level 1 regular tour of duty on a training day when the agent performed half an hour of work during the 2 hours of obligated overtime, CBP would substitute 1.5 hours of regularly scheduled overtime outside the regular tour of duty for 1.5 hours of obligated overtime when no work was performed. CBP would not provide the agent with any credit for nonwork hours under paragraph (b)(1) of this section, since the 0.5 hours of actual work plus the 1.5 substituted hours account for the entire 2-hour period. The agent would be paid for the unsubstituted half hour of creditable regularly scheduled overtime work under § 550.1624.

(3) For days of advanced training in excess of 60 days in a calendar year, an agent must be assigned a Basic regular tour of duty and be treated accordingly. If this results in a hybrid pay period in which an agent has two types of regular tours of duty within the same biweekly pay period, CBP must determine the number of overtime hours outside the regular tour of duty as provided in § 550.1623(c). For an agent who is assigned a Basic regular tour of duty during advanced training under this paragraph, CBP must change the agent's regular tour of duty to the type in effect before the Basic tour was assigned when the agent is no longer participating in advanced training.

(4) Paragraphs (b)(1) through (3) of this section apply solely to advanced training that is provided in whole-workday increments (i.e., covering an entire 8-hour basic workday).

(c) Canine care. (1) For an agent assigned to provide care for a canine and assigned to the Level 1 regular tour of duty border patrol rate of pay, the combined sum of basic pay plus the 25 percent overtime supplement is considered to provide compensation for all canine care. Such an agent must be credited with 1 hour of regularly scheduled overtime work as part of the regular tour of duty on each day containing a part of that tour, without regard to the actual duration of such care or the time and day when such care was actually provided. That leaves the agent with an additional obligation to perform 1 other hour of regularly scheduled overtime work as part of the agent's regular tour of duty on any day containing a part of the employee's tour, if the agent performs work during regular time on that day and thus has obligated overtime hours. An agent may receive no other compensation or compensatory time off for hours of canine care beyond what is specifically provided under this paragraph.

(2) If an agent is generally assigned to provide care for a canine, but is temporarily relieved of that duty for any reason (e.g., no dog available), the agent may not receive the 1-hour credit for canine care on a day when the agent is relieved from providing canine care. If the period during which the agent is temporarily relieved from providing canine care lasts more than two full pay periods, CBP must assign the agent's tour based on the agent's default election for the annual period as provided in § 550.1611(c) or (d) unless other circumstances described in paragraph (f) of § 550.1611 are applicable. For shorter periods, the Level 1 regular tour of duty assigned based on canine care responsibilities will continue unless the agent requests a different tour based on the agent's default election for the annual period.

§ 550.1623 Overtime work outside the regular tour of duty.

(a) *General.* (1) For the purpose of determining hours of overtime work outside an agent's regular tour of duty in order to apply §§ 550.1624, 550.1625, and 550.1626, CBP must apply the applicable biweekly overtime threshold prescribed in paragraphs (b) and (c) of this section. An agent's total hours of work (as determined under paragraph (a)(2) of this section) must be compared to the applicable threshold, and hours in excess of that threshold are overtime hours in applying §§ 550.1624, 550.1625, and 550.1626. The 8-hour daily and 40-hour weekly overtime thresholds under 5 U.S.C. 5542(a) and § 550.111 are not applicable to agents.

(2) An agent's total hours of work in a pay period for the purpose of applying applicable overtime thresholds is equal to the sum of:

(i) Time determined to be hours of work in duty status (regular time or overtime), subject to this subpart, 5 U.S.C. 4109 and 5 CFR 410.402 (related to training periods), and 5 U.S.C. 5542(b) and § 550.112 (establishing general rules), except that paragraphs (d) and (e) of § 550.112 are superseded by § 550.1626;

(ii) Paid leave or other paid time off during a period of nonduty status within an agent's regular time;

(iii) Obligated overtime hours during which no work is performed (creating a debt of hours) and for which no substitution is made under § 550.1626(b);

(iv) Nonwork hours deemed to be hours of work during obligated overtime hours on a day of advanced training under § 550.1622(b); and

(v) Overtime hours normally scheduled within an agent's regular tour of duty that an agent is not obligated to work because the agent performs no work during regular time on that day (as provided in paragraphs (a)(3) and (b)(3) of § 550.1621).

(b) Overtime thresholds for standard tours. (1) The applicable biweekly overtime threshold prescribed in paragraph (b)(2) of this section applies during a pay period to an agent whose regular tour of duty is fixed at one of the three standard tours for the entire pay period.

(2) For an agent covered by paragraph (b)(1) of this section, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is—

- (i) 100 hours for a Level 1 regular tour of duty;
- (ii) 90 hours for a Level 2 regular tour of duty; or
- (iii) 80 hours for a Basic regular tour of duty.

(c) Overtime threshold for hybrid pay period. (1) For a hybrid pay period in which an agent has one type of regular tour of duty in effect for one part of the period and another type for another part of the period, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is equal to the sum of the regular time hours (paid or unpaid) and the number of normally scheduled overtime hours within a regular tour of duty (whether obligated or not and whether worked or not) in the pay period. For example, if an agent has a Level 1 regular tour of duty in the first week of a pay period and a Level 2 regular tour of duty in the second week, the agent's regular time hours would be 40 in the first week and 40 in the second week and the normally scheduled overtime hours within a regular tour of duty would be 10 (5 days times 2 hours each day) in the first week and 5 (5 days times 1 hour each day) in second week, resulting in an biweekly overtime threshold of 95 hours.

(2) For a hybrid pay period in which an individual is employed as a Border Patrol agent for only part of the pay period, the threshold used to determine whether an agent has performed overtime work outside the regular tour of duty in a given pay period is equal to the sum of the

paid regular time hours (paid or unpaid) and the number of normally scheduled overtime hours within a regular tour of duty (whether obligated or not and whether worked or not) during the portion of the pay period the individual was employed as an agent. For example, if an individual is employed as an agent only during the second week of a pay period and has a Level 1 regular tour of duty, the overtime threshold would be 50 hours (40 regular time hours plus 10 normally scheduled overtime hours) in determining whether the agent has overtime hours in that week that are compensable under §§ 550.1624, 550.1625, and 550.1626.

§ 550.1624 Regularly scheduled overtime outside the regular tour of duty.

(a) *Coverage.* Any regularly scheduled overtime hours outside an agent's regular tour of duty, as specified in § 550.1623, are covered by this section, except that such hours are excluded from coverage under this section when required by the superseding provisions in § 550.1626.

(b) *Rates.* Agents receive overtime pay at the rates specified under 5 U.S.C. 5542(a) and § 550.113 for regularly scheduled overtime hours covered by paragraph (a) of this section, subject to the premium pay limitation established under 5 U.S.C. 5547 and §§ 550.105 and 550.107. An agent's rate of basic pay (without any overtime supplement) is used in computing overtime pay for such hours.

(c) *Avoiding additional regularly scheduled overtime.* (1) As required by section 2(c)(2) of the Border Patrol Agent Pay Reform Act of 2014 (Public Law 113-277), CBP must, to the maximum extent practicable, avoid the use of regularly scheduled overtime work by agents outside of the regular tour of duty.

(2) Notwithstanding paragraph (c)(1) of this section, CBP may allow use of regularly scheduled overtime work outside an agent's regular tour of duty if an agent volunteers to perform such overtime (e.g., to reduce an overtime hours debt).

§ 550.1625 Irregular overtime and compensatory time off.

(a) Coverage. An agent is entitled to compensatory time off as provided in this section for irregular overtime hours outside an agent's regular tour of duty, as specified in § 550.1623, except that such hours are excluded from coverage under this section (except paragraph (c) of this section) when required by the superseding provisions in § 550.1626. The compensatory time off provisions in 5 U.S.C. 5543 and 5 CFR 550.114 are not applicable to an agent.

(b) Earning on an hour-for-hour basis for irregular overtime. Subject to the limitations specified in this section and the superseding provisions in § 550.1626, an agent must receive compensatory time off for an equal amount of time spent performing irregular overtime work.

(c) Call-back overtime work. Notwithstanding paragraph (b) of this section, consistent with 5 U.S.C. 5542(b)(1) and § 550.112(h), an agent must be deemed to have performed 2 hours of irregular overtime work for a lesser amount of irregular overtime work if—

(1) An agent is required perform such work on a day when the agent was not scheduled to work; or

(2) An agent is required to return to the agent's place of employment to perform such work.

(d) Earning limited by premium pay cap. An agent may not be credited with earning compensatory time off if the value of such time off would cause the sum of the agent's basic pay and premium pay in the given pay period to exceed the limitation established under 5 U.S.C. 5547 and §§ 550.105 and 550.107 in the period in which it was earned. The dollar value of compensatory time off for the purpose of this paragraph is the amount of overtime pay the agent would have received for the period during which compensatory time off was earned if the overtime had been regularly scheduled outside the agent's regular tour of duty.

(e) Pay period limit. (1) An agent may not earn more than 10 hours of compensatory time off during any pay period unless—

(i) CBP, as it determines appropriate, approves in writing a waiver of the 10-hour limit; and

(ii) Such waiver approval is executed in advance of the performance of any work for which compensatory time off is earned.

(2) If a waiver of the 10-hour limit described in paragraph (e)(1) of this section is not granted, the agent involved may not be ordered to perform the associated overtime work.

(f) Annual period limit. An agent may not earn more than 240 hours of compensatory time off during an annual period.

(g) Usage. (1) An agent may use compensatory time off by being excused from duty during regular time (in an amount equal to the compensatory time off being used) during the agent's basic workweek.

(2) An agent's balance of unused compensatory time off is used to satisfy an overtime hours debt, as provided in § 550.1626(c)(1).

(h) Time limit for usage and forfeiture. An agent must use any hours of compensatory time off not later than the end of the 26th pay period after the pay period during which the compensatory time off was earned. Any compensatory time off not used within that time limit, or prior to separation from an agent position, is forfeited and not available for any purpose, regardless of the circumstances. An agent may not receive any cash value for unused compensatory time off. An agent may not receive credit towards the computation of the agent's retirement annuity for unused compensatory time off.

§ 550.1626 Leave without pay during regular time and absences during obligated overtime hours.

(a) Substitution for leave without pay during regular time. (1) For any period of leave without pay during an agent's regular time (basic workweek), an equal period of work outside the agent's regular time in the same pay period must be substituted to the extent such work was performed. Any time substituted for leave without pay must be treated for all pay computation purposes as if it were regular time (except as provided in paragraph (a)(5) of this section) and may not be considered an overtime hour of work for any purpose, including §§ 550.1621(a)(4) and (b)(4), 550.1624, and 550.1625.

(2) Hours of work must be substituted for regular time work under paragraph (a)(1) of this section before being substituted for regularly scheduled overtime within the agent's regular tour of duty under paragraph (b) of this section.

(3) Hours used for substitution under paragraph (a)(1) of this section must be substituted in the following priority order: first, irregular overtime hours; second, regularly scheduled overtime hours outside the regular tour of duty; and third, regularly scheduled overtime hours within the regular tour of duty.

(4) The substitution of overtime hours for leave without pay is solely for pay computation purposes. The substitution does not change the hours of an agent's basic workweek or the fact that the agent was in a particular type of nonpay status during those hours. The hours that are substituted are considered to have been performed when they were worked, not during the leave without pay hours for which they are substituted. For example, if an agent performs 4 hours of overtime work outside the agent's regular tour of duty during the first week of a pay period and then is placed in leave without pay during the second week due to a shutdown furlough caused

by a lapse in appropriations, the 4 hours must be substituted for furlough hours for the purpose of computing pay owed the agent for the week before the furlough began.

(5) If overtime hours are substituted for an absence without approval (AWOL) or a suspension, the basic pay for such substituted hours may not be used in computing an agent's overtime supplement.

(b) Substitution for absences during obligated overtime hours within the regular tour of duty. (1) For a period of absence during obligated overtime hours within an agent's regular tour of duty, an equal period of work outside the agent's regular tour of duty in the same pay period must be substituted to the extent such work was performed. Any time so substituted must be treated for all pay computation purposes as if it were obligated overtime work and may not be considered an overtime hour of work for any other purpose, including §§ 550.1624 and 550.1625.

(2) In substituting hours of work under paragraph (b)(1) of this section, work performed on the same day as the period of absence must be substituted first in circumstances described in § 550.1622(b)(2). Hours substituted under this paragraph must be substituted in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty.

(3) After substituting hours under paragraph (b)(2) of this section, any remaining hours used for substitution under paragraph (b)(1) of this section must be substituted in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty.

(4) The substitution of overtime hours outside the regular tour of duty for obligated overtime hours not worked is solely for pay computation purposes. The substitution does not

change the hours of an agent's regular tour of duty. The hours that are substituted are considered to have been performed when they were worked, not during the obligated overtime hours for which they are substituted.

(c) Application of compensatory time off or future overtime work to offset overtime hours debt. (1) If a Border Patrol agent does not have sufficient additional work in a pay period to substitute for all periods of absence during obligated overtime hours within the agent's regular tour of duty for that pay period, any unused balance of compensatory time off hours previously earned under § 550.1625 must be applied towards the newly accrued overtime hours debt.

(2) If an agent has a remaining overtime hours debt after applying paragraphs (b) and (c)(1) of this section, any additional overtime work outside the agent's regular tour of duty in subsequent pay periods that would otherwise be credited under § 550.1624 or § 550.1625 must be applied towards the overtime hours debt until that debt is satisfied. The application of such hours must be done in the following priority order: first, irregular overtime hours; and second, regularly scheduled overtime hours outside the regular tour of duty. Any overtime hour applied under this paragraph (c)(2) may not be considered an overtime hour of work for any other purpose.

(d) Unsatisfied overtime hours debt at movement to a non-agent position or separation. (1) Any unsatisfied overtime hours debt that exists at the time of movement to a non-agent position or separation from Federal service must be recovered to the extent possible by offsetting the affected employee's positive balance (if any) of annual leave, time-off awards, or compensatory time off for travel. In cases where the offset will totally eliminate the debt, an agent's balances must be applied in the following order: first, the balance of annual leave;

second, the balance of time-off awards; and third, the balance of compensatory time off for travel.

(2) Any unsatisfied overtime hours debt that exists at the time of movement to a non-agent position or separation from Federal service after applying paragraph (d)(1) of this section must be converted to a monetary debt equal to the result of multiplying the agent's hourly rate of basic pay at the time of movement to a non-agent position or separation by the number of hours in the overtime hours debt. CBP must follow standard debt collection procedures to recover any debt.

Relationship to Other Provisions

§ 550.1631 Other types of premium pay.

(a) An agent may not receive premium pay for night, Sunday, or holiday work for hours of regularly scheduled overtime work within the agent's regular tour of duty.

(b) An agent may receive premium pay for night, Sunday, or holiday work, as applicable, for hours not covered by paragraph (a) of this section, in accordance with 5 U.S.C. 5545(a) and (b) and section 5546 and corresponding regulations, except that section 5546(d) does not apply. (For an agent, pay for overtime work on a Sunday or holiday is determined under 5 U.S.C. 5542(g), not under section 5546(d).) The agent's rate of basic pay (without any overtime supplement) must be used in computing such premium payments.

(c) An agent may not be paid standby duty premium pay under 5 U.S.C. 5545(c)(1) or administratively uncontrollable overtime pay under 5 U.S.C. 5545(c)(2).

§ 550.1632 Hazardous duty pay.

An agent is eligible for hazardous duty pay, subject to the requirements in 5 U.S.C. 5545(d) and subpart I of this part. The agent's rate of basic pay (without any overtime supplement) must be used in computing any hazardous duty pay.

§ 550.1633 Treatment of overtime supplement as basic pay.

Regularly scheduled overtime pay within an agent's regular tour of duty is treated as part of basic pay or basic salary only for the following purposes:

- (a) 5 U.S.C. 5524a and 5 CFR part 550, subpart B, pertaining to advances in pay;
- (b) 5 U.S.C. 5595(c) and 5 CFR part 550, subpart G, pertaining to severance pay;
- (c) 5 U.S.C. 8114(e), pertaining to workers' compensation;
- (d) 5 U.S.C. 8331(3) and 5 U.S.C. 8401(4) and related provisions that rely on the definition in those paragraphs, pertaining to retirement benefits;
- (e) Subchapter III of chapter 84 of title 5, United States Code, pertaining to the Thrift Savings Plan;
- (f) 5 U.S.C. 8704(c), pertaining to life insurance; and
- (g) For any other purposes explicitly provided for by law or as the Office of Personnel Management may prescribe by other regulation.

§ 550.1634 Leave and other paid time off.

(a) An agent is subject to the rules governing leave accrual and usage under 5 U.S.C. chapter 63 on the same basis as other employees. The tour of duty for leave accrual and usage purposes is the basic workweek, which excludes regularly scheduled overtime hours within the regular tour of duty established under this subpart. The agent must be charged corresponding

amounts of leave for each hour (or part thereof) the agent is absent from duty during regular time (except that full days off for military leave must be charged when required).

(b) An agent is subject to the normally applicable rules governing other types of paid time off (such as holiday time off under 5 U.S.C. chapter 61, compensatory time off for religious observances under subpart J of this part, or compensatory time off for travel under subpart N of this part) on the same basis as other covered employees. The tour of duty used in applying those rules is the basic workweek, which excludes regularly scheduled overtime hours within the regular tour of duty established under this subpart. The agent must be charged corresponding amounts of paid time off for each hour (or part thereof) the agent is absent from duty during regular time.

(c) In computing a lump-sum annual leave payment under 5 U.S.C. 5551-5552, an overtime supplement for an agent's regularly scheduled overtime hours within the agent's regular tour of duty is included, as provided in § 550.1205(b)(5)(iv).

§ 550.1635 Alternative work schedule.

An agent may not have a flexible or compressed work schedule under 5 U.S.C. chapter 61, subchapter II. The regular tour of duty established under this subpart is a special work schedule established under 5 U.S.C. 5550. CBP may allow flexible starting and stopping times for an agent's basic workday if it determines such flexibility is appropriate for the position in question.

§ 550.1636 Exemption from Fair Labor Standards Act.

The minimum wage and the hours of work and overtime pay provisions of the Fair Labor Standards Act do not apply to Border Patrol agents. (See also 5 CFR 551.217.)

§ 550.1637 Travel time.

(a) A Border Patrol agent's travel time to and from home and the agent's regular duty station (or to an alternative work location within the limits of the agent's official duty station, as defined in § 550.112(j)) may not be considered hours of work under any provision of law.

(b) Official travel time away from an agent's official duty station may be creditable hours of work as provided in § 550.112(g). When an agent travels directly between home and a temporary duty location outside the limits of the agent's official duty station (as defined in § 550.112(j)), the time the agent would have spent in normal home to work travel must be deducted from any creditable hours of work while traveling.

§ 550.1638 Official time.

An agent who uses official time under 5 U.S.C. 7131 may be assigned to a Level 1 or Level 2 regular tour of duty, but is required to perform agency work during obligated overtime hours or to accrue an overtime hours debt. Official time may be used during overtime hours only when, while the agent is engaged in the performance of agency work, an event arises incident to representational functions that must be immediately addressed during the overtime hours. CBP may excuse the agent from duty during scheduled obligated overtime hours if it determines that an agent's official time duties during the basic workday make it impracticable to perform agency work during the scheduled obligated overtime hours on that day. The agent will accrue an overtime hours debt for that excused time. If CBP excuses the agent in this manner, then it must provide the agent with an opportunity to eliminate the resulting overtime hours debt by performing agency work outside the agent's regular tour of duty at another time. As provided in § 550.1621(e), official time during regular time is considered to be "work" when an agent otherwise would be in a duty status in applying paragraphs (a)(3) and (b)(3) of § 550.1621.

PART 551—PAY ADMINISTRATION UNDER THE FAIR LABOR STANDARDS ACT

18. The authority citation for part 551 continues to read as follows:

Authority: 5 U.S.C. 5542(c); Sec. 4(f) of the Fair Labor Standards Act of 1938, as amended by Pub. L. 93–259, 88 Stat. 55 (29 U.S.C. 204f).

Subpart B--Exemptions and Exclusions

19. In § 551.216, revise paragraph (c)(2) to read as follows:

* * * * *

§ 551.216 Law enforcement activities and 7(k) coverage for FLSA pay and exemption determinations.

* * * * *

(c) * * *

(2) Employees whose primary duties involve patrol and control functions performed for the purpose of detecting and apprehending persons suspected of violating criminal laws;

* * * * *

20. Add § 551.217 to read as follows:

§ 551.217 Exemption of Border Patrol agents.

A Border Patrol agent (as defined in 5 U.S.C. 5550(a)(2) and 5 CFR 550.1603) is exempt from the minimum wage and the hours of work and overtime pay provisions of the Act.

PART 870—FEDERAL EMPLOYEES’ GROUP LIFE INSURANCE PROGRAM

21. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8704(c), 8716; Subpart J also issued under section 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; Sec. 870.302(a)(3)(ii) also issued under section 153 of Pub. L. 104–134, 110 Stat. 1321; Sec. 870.302(a)(3) also issued under sections 11202(f),

11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251, and section 7(e) of Pub. L. 105–274, 112 Stat. 2419; Sec. 870.302(a)(3) also issued under section 145 of Pub. L. 106–522, 114 Stat. 2472; Secs. 870.302(b)(8), 870.601(a), and 870.602(b) also issued under Pub. L. 110–279, 122 Stat. 2604; Sec. 870.510 also issued under Sec. 1622(b) of Public Law 104–106, 110 Stat. 515; Subpart E also issued under 5 U.S.C. 8702(c); Sec. 870.601(d)(3) also issued under 5 U.S.C. 8706(d); Sec. 870.703(e)(1) also issued under section 502 of Pub. L. 110–177, 121 Stat. 2542; Sec. 870.705 also issued under 5 U.S.C. 8714b(c) and 8714c(c); Public Law 104–106, 110 Stat. 521.

Subpart B—Types and Amount of Insurance

22. In § 870.204, remove “and” at the end of paragraph (a)(2)(x), remove the period at the end of paragraph (a)(2)(xi) and add in its place “; and”, and add paragraph (a)(2)(xii).

The addition reads as follows:

§ 870.204 Annual rates of pay.

* * * * *

(a) * * *

(2) * * *

(xii) An overtime supplement for regularly scheduled overtime within a Border Patrol agent’s regular tour of duty under 5 U.S.C. 5550 (as required by 5 U.S.C. 5550(d)).

* * * * *

Billing Code 6325-39-P

[FR Doc. 2015-24199 Filed: 9/24/2015 08:45 am; Publication Date: 9/25/2015]